OVERSIGHT REVIEW OF THE DEPARTMENT OF LABOR'S OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS AND AFFIRMATIVE ACTION PROGRAMS

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 18, 1985

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OVERSIGHT REVIEW OF THE DEPARTMENT OF LABOR'S OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS AND AFFIRMATIVE ACTION PROGRAMS

WEDNESDAY, SEPTEMBER 18, 1985

HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Present from the Subcommittee on Employment Opportunities: Representatives Martinez, Hayes, Gunderson, Henry and ex officio member Jeffords.

Staff present: Eric P. Jensen, acting staff director; Paul Cano, assistant staff director; Genevieve Galbreath, chief clerk/staff assistant; Valerie White, legislative assistant; Dr. Beth Buehlmann, Republican staff director for education; and Mary Gardner, Republican legislative associate.

Mr. MARTINEZ. This meeting will come to order. This meeting of the Subcommittee on Employment Opportunities is called to conduct an oversight hearing on the Labor Department's Office of Federal Contract Compliance Programs.

The Office of Federal Contract Compliance Programs is the office responsible for monitoring and enforcing the nondiscrimination provisions of the Executive Order No. 11246, and other laws, which govern contractors doing business with the Federal Government.

It is estimated that approximately 75,000 prime contractors doing over 200 billion dollars' worth of business, while hiring over 21 million workers, are involved in the Federal contracting program. As a condition of receiving Federal funds, these companies agree to abide by the provisions of the Federal nondiscrimination laws.

Regulations issued by the OFCCP, under Executive Order No. 11246, require compliance reviews and investigations of complaints in order to ensure nondiscrimination in the work practices of the contractors.

Statistical measures are tools used to guage the underutilization and to assess the presence of employment discrimination. Where minority men and women are underutilized relative to the work force, affirmative action policies are applied to overcome the ves-

tiges of discrimination. These policies have been proven to be successful in achieving access to the work force for minorities and women workers.

Unfortunately, these policies are at the center of considerable controversy involving the Department of Labor's current Executive Order No. 11246 guidelines. As the concerned chairman of the Employment Opportunities Subcommittee, I hope that the administration will not blithely undo the 20 years of civil rights work by modifying or repealing the legal tools used to achieve these gains of equality. Over 125 of my congressional brethren have asked the White House in a letter delivered yesterday not to dismantle the tools of equal employment opportunity.

Although Secretary Brock could not be here today, I urge the administration officials to convey to him and the administration our very deep concern over the potential demise of Executive Order No. 11246 guidelines. The tools used under these policies have been legally sanctioned by Congress and the courts. The impact upon minority and women workers will be devastating. There is simply no need at this point in time to gratuitously throw away these effective devices.

With this, I would like to ask Mr. Gunderson if he has an opening statement.

Mr. GUNDERSON. Thank you, Mr. Chairman. I do, and I would ask unanimous that a lengthy statement may be put into the record, and rather summarize my remarks at this point in time, if that's all right.

Mr. MARTINEZ. So ordered.

[The prepared statement of Hon. Steve Gunderson follows:]

PREPARED STATEMENT OF HON. STEVE GUNDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. Chairman, and other Members of the Subcommittee, I want to take this time to extend a welcome to those witnesses who will be testifying here today, aiding us as we continue our oversight activities over Federal programs that provide equal employment opportunities for all citizens of the United States. I particularly want to welcome Ms. Susan Meisinger, the Deputy Undersecretary for Employment Standards, at the Department of Labor, and Mr. Joseph Cooper, the new Director of the Office of Federal Contract Compliance Programs, OFCCP. I am confident that your remarks will prove to be most helpful.

Today's hearing was called in order that this Subcommittee might focus on the enforcement activities of the OFCCP, as well as on the effectiveness of the programs that it administers. As we all know, the OFCCP's responsibilities include the administration of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Assistance Act.

Issued in 1965 by President Lyndon Johnson, Executive Order 11246, as amended, is the latest in a long line of executive orders, dating to the Roosevelt Era, to eliminate employment discrimination practiced by Federal government contractors. Under that order, all nonexempt employers bidding for or holding Federal government assistance, are subject to the following dual obligations with respect to their employment practices: 1) Not to discriminate against employees or applicants because of race, color, religion, sex or national origin; and 2) to take affirmative action to insure that applicants and employees are employed without regard to such factors. The affirmative concept however, requires that such an employer do more than simply refrain from discriminatory practices and policies -- it requires the employer to go beyond the maintenance of policies of passive non-discrimination, by taking positive, results-oriented steps

toward the elimination of employment barriers to minorities and to women.

Upon the issuance of Executive Order 11246, the Office of Contract Compliance (OFCC) was established in the Department of Labor to carry out the Order's enforcement that same year. Then in June of 1975, the OFCC was merged with the two other equal employment programs within the Labor Department's Employment Standards Administration into the Office of Federal Contract Compliance Programs (OFCCP), the program as we know it today, which monitors employment practices of federal govenment contractors with respect to hiring minorities, women, the handicapped, and Vietnam-era, as well as all disabled veterans.

As I previously stated, today's hearing was called to provide Subcommittee Members with the opportunity to further study the enforcement mechanisms employed by the OFCCP under its current program, and to evaluate their effectiveness. It will be very tempting this morning to have our focus diverted from the administration of the current Executive Order, as well as the other programs over which the Office has jurisdiction, to the possible changes that the President is now considering with regard to Executive Order 11246. However, we must keep in mind that officials here today from the Department of Labor can and should only address the programs for which they have the responsibility of enforcing. It would be highly inappropriate for them to address any potential changes in this program that have not yet occurred.

Instead, it is very important that the Department provide the Subcommittee with information on the current methods used by the OFCCP to ensure that all Federal contractors and federally-assisted construction contractors not discriminate and that they take affirmative action without regard to race, color, religion, national origin or sex in all of their personnel practices.

It is the intent of this hearing to see how this process has worked over the years under the current Executive Order -- to identify the program's weaknesses and its strengths.

It is the responsibility of this Subcommittee to study the methods employed by the OFCCP in assessing contractor compliance. We must ask questions that clearly define how the OFCCP uses its authority to enforce its responsibilities.

I for one am very interested in learning more about the Department's current initiatives that are being undertaken within the OFCCP to improve the performance of its program.

I encourage Department Officials to inform us today about the Office's performance record to date -- to provide us with information about the number of compliance reviews that are being conducted each year under this Administration -- as well as

information on how the quality of those reviews is being maintained.

This Subcommittee needs more indepth information concerning the OFCCP's actual enforcement efforts. Where violations and/or deficiencies are found, we need to have clear answers as to how the OFCCP attempts to secure compliance; a picture of what circumstances warrant remedies and sanctions, and where conciliation and persuasion are the preferable actions.

A thorough evaluation of the current program as is now being administered at the OFCCP can only serve to strengthen the Office itself within the Department of Labor. Such an evaluation will certainly strengthen our understanding of the current status of Affirmative Action programs within those employers contracting with the Federal government.

In reviewing the data that we have received over the past months from the Department of labor, the program within the OFCCP appears to working -- and working well. While improvements can be made in any program, the Department of Labor's commitment to the elimination of unlawful discrimination in the workpace, particularly under Secretary Brock, appears to be strong.

Again, I look forward to hearing the testimony of our witnesses here today. I just hope that we will keep on the track in determining the effectiveness of our current program.

STATEMENT OF STEVE GUNDERSON, SUBCOMMITTEE MEMBER

Mr. GUNDERSON. I would like to take this opportunity to thank you for calling this morning's hearing. I think it's important that this subcommittee conduct its traditional, almost annual oversight over the entire Federal Contract Compliance Program, and determine its effectiveness, how it's administered, and so forth.

We have a unique opportunity today in our Department witnesses. If I recall correctly, this is the first time Under Secretary Meisinger has been before us, at least this session; and we also have an opportunity to welcome one of the new members of the so-called Brock administration at Department of Labor, Mr. Joseph Cooper, who is, of course, 4 weeks on board as the new head of the Office of Federal Contract Compliance Programs. So we want to welcome both of you to this committee, and at least for myself and I think the whole subcommittee we pledge our mutual cooperation in working together during this oversight process.

It's going to be very tempting today, particularly as I look at a number of the proposed statements that are here, to focus solely on the issue of possible repeal of Executive Order 11246; however, that is not the intent of the hearing today. The intent of today's hearing is to provide oversight over the present programs, and the administration of those programs, et cetera, within the OFCCP.

I think it would be inappropriate for us to expect, for example, the Department of Labor today to address the potential changes in the program when there is, in secret to no one, great controversy within the administration as to exactly how this issue may be resolved in the future.

I'll be the first to tell you that I have some very strong convictions about systemic discrimination in this country, and if the Department and the administration come out with an Executive order that totally abolishes such mechanisms as the timetables, goals, et cetera, I'll have some questions in that regard myself later on. But I think it's clearly inappropriate for us today to try to discuss the possible, the hypothetical, and expect especially the Department of Labor to try to defend something that has or has not, may or may not happen in the future.

I'd like to encourage both our first witnesses and those that follow to rather focus on the current methods that are used by OFCCP to ensure that all Federal contractors do comply with the affirmative action requirements as stated in the current Executive orders and laws. It ought to be our intent in this hearing to look at how the process has worked over the years, to assess its weaknesses and strengths. In particular, I think we want to concentrate particularly over the last 4 to 5 years. That may be a little bit difficult for Mr. Cooper, but probably Ms. Meisinger can help out in that regard with her experience at the Department and expertise in this area.

It seems to me that we as a subcommittee ought to study the Department's methods of assessing contractor compliance, whether they've worked or haven't worked, to define how OFCCP uses its authority to enforce its responsibilities Then, of course, when you get into the question of determining wnere violations have or have not occurred, particularly where they are found, we need to have

clear answers as to how the Department attempts to secure compliance, whether through conciliation and persuasion as the preferable action or rather enforcement through remedies and sanctions.

Finally, I think one of the key issues that we as an employment opportunity subcommittee must focus on is not only the organization structure within OFCCP itself, but also the interaction between the OFCCP at the Department of Labor, the Department of Justice, and the Equal Employment Opportunity Commission, et cetera.

We have a wide and diverse host of mechanisms throughout the Federal Government to deal with the issue of discrimination, and I think one of the purposes of oversight is to make sure that these are working and interacting effectively and efficiently between the different branches of the Government—so that "one government isn't the EEOC, another the OFCCP, et cetera."

With that, I look forward to the testimony not only of our first witnesses from the Department but the others as well. Let's try to focus today, if we can, on an oversight of the OFCCP's current activities. Mr. Chairman, I'll be the first to join with you, if the administration later on comes out with a change in the whole enforcement process for affirmative action programs such as the use of goals and timetables. At that point, I think we ought to call the administration up to explain new proposals, should they occur, and to defend them at that point intime; but let's today focus on the facts of today, and tomorrow focus on the facts of tomorrow, should they be different at that time.

Thank you.

Mr. MARTINEZ. Thank you, Mr. Gunderson. We're joined by Paul Henry. Congressman, do you have an opening statement?

Mr. HENRY. Well, just to say, Mr. Chairman, that I, too, would say we're really after the facts and not all the speculations. The one thing, though, I said in a previous hearing, which you chaired several weeks ago when we had the Civil Rights Commission before us is the problem that the current administration really labors under a tremendous credibility gap in this area. Obviously, that is why the concern comes out as it does and has.

I think, in that hearing we set the record straight, and hopefully—I'm not sure all those issues have been fully resolved yet, but we certainly got closer to it than when we started, in terms of finding out what some of the problems are. Maybe we can lay to rest problems where they're simply speculative, and deal really on matters of fact rather than speculation.

Mr. MARTINEZ. Thank you, Mr. Henry.

With that, we turn to the witnesses. The first of the witnesses we have here, Mr. Joseph Cooper and Ms. Susan Meisinger. With that, I turn it over to you.

STATEMENT OF SUSAN R. MEISINGER, DEPUTY UNDER SECRETARY FOR EMPLOYMENT STANDARDS, U.S. DEPARTMENT OF LABOR

Ms. MEISINGER. Mr. Chairman and members of the subcommittee. Thank you for the opportunity to appear for your subcommittee today to discuss the Department of Labor's equal employment

opportunity and affirmative action compliance program for Federal contractors. I would like to take this opportunity to introduce Joseph N. Cooper, who has recently been appointed as the Director of the Office of Federal Contract Compliance Programs.

As you know, the Department of Labor is responsible for the administration and enforcement of the three mandates which make up the contract compliance program, Executive Order 11246 as amended, section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Assistant Act.

At the outset I want to express our appreciation of your efforts and the efforts of the subcommittee in seeking to assure that the contract compliance program lives up to its potential as an instrument for providing equal employment opportunities for all.

Under Executive Order 11246, Federal contractors may not discriminate in employment, and they are required to take affirmative action to ensure that applicants and employees are treated without regard to race, color, sex, religion or national origin. Every hiring decision must be made by hiring the most qualified individual without regard to that person's race or sex.

This administration believes that the American public fully and wholeheartedly supports the concept of equal employment opportunity for all, and opposes any implicit or explicit use of numerical quotas. There is no question that we have an obligation to afford the disadvantaged a chance to fully share in the economic opportunities of this country. The administration fully supports the concept that firms which do business with the Federal Government have an obligation to take affirmative action without resorting to the use of quotas, to ensure that the disadvantaged are given an affirmative opportunity to play a productive role in the labor market.

Secretary Brock has devoted a considerable amount of time to reviewing the contract compliance program. His objective is simple, a contract compliance program which provides the maximum possible opportunity for people to compete for the employment opportunities in this country.

As you know, the administration is looking at this policy. However, I am not at liberty to discuss this examination at this time.

Mr. Chairman, I'd like to briefly describe some of the initiatives being undertaken by the Employment Standards Administration's Office of Federal Contract Compliance Programs to improve the performance of the program.

First, to ensure the quality of our compliance reviews is maintained at a high level, a special task force was established to examine compliance review files to check for conformance with established policies and procedures. This task force is nearing completion of its work and will have preliminary findings by the end of this year.

In order to enhance the program's ability to increase productivity without sacrificing quality, we are now in the process of improving major internal management information systems.

The ultimate success of the program depends upon the effectiveness of the staff. It must be well trained and highly informed. We are developing comprehensive training programs for our compliance officers.

Linkage agreements were originally envisioned as means for coordinating the activities within the Department of Labor. It's been ongoing since 1979, and while there have been isolated assessments of linkages, there have been no comprehensive or coordinated evaluation of this activity. We have begun to study the kinds and nature of linkages actually obtained in an effort to identify and encourage successful programs.

Mr. Chairman, now that I have outlined some major program initiatives, I would like to review the performance record of the program in a number of key operational areas. I believe the data clearly demonstrate the strong commitment of this administration to vigorous enforcement of the Federal contract compliance programs.

During fiscal year 1984 OFCCP completed 5,025 compliance reviews. During the first three quarters of this fiscal year, 3,924 reviews were conducted; and we project that over 5,200 reviews will be completed by the end of this fiscal year. At the end of fiscal year 1980 the figure was 2,632. Thus, the number of compliance reviews has been dramatically increased since 1980. In fact, OFCCP completed more compliance reviews in fiscal year 1984 than ever recorded in any one year since consolidation of the contract compliance program in 1978.

Since we have increased the number of establishments reviewed, we are now in a position to check the employment practices and procedures that have an impact on tens of thousands or more individuals, including minorities, women, veterans, and handicapped groups.

While OFCCP increased the number of reviews conducted, every effort has been made to assure that the quality of the reviews was maintained. The fact that the rate of noncompliance found for fiscal year 1984—about 63 percent—and that found in the first three quarters of fiscal year 1985—about 65 percent—mirrors the rate of noncompliance recorded in every year since consolidation is an indication that the quality of the reviews has been maintained.

In those situations where the program finds noncompliance by a contractor, we follow a principal mandate of the Executive order, which is similar to the mandates of title VII. First, we attempt to secure compliance by "methods of conference, conciliation, mediation and persuasion." If these methods fail, then we proceed with formal enforcement action. The program has been quite successful in reaching settlements with contractors through conciliation agreements or letters of commitment.

Since fiscal year 1984 conciliation agreements or letters of commitments were obtained in approximately 3,200 reviews where contractor noncompliance was found. When conciliation has not been successful, the program has not hesitated to use formal enforcement procedures to achieve contractor compliance. I assure this subcommittee that this policy will be continued.

In 1981 a conscious decision was made to eliminate the tremendous backlog of complaints. I understand that some complaints were so old that the complainants could not be located or were no longer interested. Now that this backlog has been eliminated, we are in a position to initiate investigations of complaints while the evidence is still fresh, and get relief for victims much more quickly.

By the end of fiscal year 1984 OFCCP had completed 1,246 complaint investigations. These complaint investigations were in addition to the 5,025 compliance reviews. These 6,000 plus compliance reviews and investigations have yielded almost $33 million in financial settlements. The 1984 financial settlements were to identified victims of discrimination, and also include moneys committed by contractors for special training programs and reasonable accommodations for qualified handicapped individuals.

Finally, we have worked to change the long held belief in the contractor community that if you have never been reviewed by the OFCCP, your chances of ever being reviewed were slim. Our new selection procedures have had the effect of increasing the number of first-time compliance reviews. In fiscal year 1984 OFCCP conducted 3,205 first-time reviews, or 62 percent, as compared to 460, or 15 percent, of the total reviews in 1981.

OFCCP has conducted 2,507 first-time reviews at the end of the third quarter of this fiscal year, and projects completion of about 3,350 or 64 percent of total reviews by the end of the fiscal year.

Mr. Chairman, in summary, we believe that our testimony today demonstrates the strong commitment of the Labor Department under this administration to the elimination of unlawful discrimination from the workplace. This commitment is reflected in the many actions taken by the Department to improve the enforcement of the Executive order as well as other contract compliance programs.

Mr. Cooper and I will be pleased to answer any questions that the committee would have at this time.

[The prepared statement of Susan R. Meisinger follows:]

PREPARED STATEMENT OF SUSAN R. MEISINGER, DEPUTY UNDER SECRETARY FOR EMPLOYMENT STANDARDS, U.S. DEPARTMENT OF LABOR

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before your Subcommittee today to discuss the Department of Labor's equal employment opportunity and affirmative action compliance program for Federal contractors. I would like to take this opportunity to introduce Joseph N. Cooper, who has recently been appointed as the Director of the Office of Federal Contract Compliance Programs.

As you know, the Department of Labor is responsible for the administration and enforcement of the three mandates which make up the contract compliance program--Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012.

At the outset, I want to express our appreciation of your efforts and the efforts of this Subcommittee in seeking to assure that the contract compliance program lives up to its potential as an instrument for providing equal employment opportunities for all.

Under Executive Order 11246, Federal contractors may not discriminate in employment and they are required to take affirmative action to ensure that applicants and employees

are treated without regard to race, color, sex, religion, or national origin. Every hiring decision must be made by hiring the most qualified individual without regard to that person's race or sex.

This Administration believes that the American public fully and wholeheartedly supports the concept of equal employment opportunity for all, and opposes any implicit or explicit use of numerical quotas. There is no question that we have an obligation to afford the disadvantaged a chance to fully share in the economic opportunities of this country. The Administration fully supports the concept that firms which do business with the Federal Government have an obligation to take affirmative action, without resorting to the use of quotas, to ensure that the disadvantaged are given an affirmative opportunity to play a productive role in the labor market.

Secretary Brock has devoted a considerable amount of time to reviewing the contract compliance program. His objective is simple--a contract compliance program which provides the maximum possible opportunity for people to compete for the employment opportunities in this country.

As you know, the Administration is looking at this policy. However, I am not at liberty to discuss this examination at this time.

Mr. Chairman, I would now like to briefly describe some of the initiatives being undertaken by the Employment Standards Administration's Office of Federal Contract Compliance Programs to improve the performance of the program.

- To ensure the quality of our compliance reviews is maintained at a high level, a special task force was established to examine compliance review files to check for conformance to established policies and procedures. This task force is nearing completion of its work and will have preliminary findings by the end of this year.
- In order to enhance the program's ability to increase productivity without sacrificing quality, we are now in the process of improving two major internal management information systems. The two systems under review are the Compliance Review Information System (CRIS) and Complaint Administration System (CAS). The CRIS system monitors and tracks results of compliance reviews in both the construction and other industries. The CAS system tracks and monitors processing of complaints and procedures, and various management, operational, and court-ordered reports.
- The ultimate success of the program depends upon the effectiveness of the staff. It must be well-trained and highly informed. We are developing a

comprehensive training program for our compliance officers. The training will include instruction on identifying and proving instances of illegal discrimination.

- Linkage agreements were originally envisioned as means for coordinating the activities of the Employment and Training Administration (ETA) and the Employment Standards Administration which could lead to identifying participants in ETA's employment and training programs for positions in establishments reviewed by OFCCP. This activity has been ongoing since 1979, and, while there have been isolated assessments of "linkages", there has been no comprehensive or coordinated evaluation of this activity. We have begun to study the kinds and nature of linkages actually obtained in an effort to identify and encourage successful programs. We expect to complete this study in the near future.

Mr. Chairman, now that I have outlined some major program initiatives, I would like to review the performance record of the program in a number of key operational areas. I believe the data clearly demonstrate the strong commitment of this Administration to vigorous enforcement of the Federal contract compliance program.

During FY 1984, OFCCP completed 5,025 compliance reviews. During the first three quarters of FY 1985, 3,924 compliance reviews were conducted, and we project that over 5,200 compliance reviews will be completed by the end of this fiscal year. At the end of FY 1980, the figure was 2,632. Thus, the number of compliance reviews has been dramatically increased since 1980. In fact, OFCCP completed more compliance reviews in FY 1984 than previously recorded in any one year since the consolidation of the Federal contract compliance program in 1978.

Since we have increased the number of establishments reviewed, we are now in a position to check the employment practices and procedures that have an impact on tens of thousands or more individuals, including minorities, women, veterans, and handicapped persons. For example, in FY 1984, the reviews covered establishments employing a total of approximately 2.9 million workers compared to 2.0 million workers in FY 1981, the first year in which such data were kept. By the end of the third quarter of FY 1985, we have reviewed establishments employing 2.1 million workers.

While OFCCP increased the number of reviews conducted, every effort was made to assure that the quality of the reviews was maintained. The fact that the rate of noncompliance found for FY 1984 (approximately 63 percent) and that found for the first three quarters of FY 1985 (about 65 percent)

mirrors the rate of noncompliance recorded in every year since consolidation is an indication that the quality of the reviews was maintained.

In those situations where the program finds noncompliance by a contractor, we follow a principal mandate of the Executive Order which is similar to the mandates of Title VII. First, we attempt to secure compliance "by methods of conference, conciliation, mediation, and persuasion." If these methods fail, then we proceed with formal enforcement action. The program has been quite successful in reaching settlements with contractors through conciliation agreements or letters of commitment. During FY 1984, conciliation agreements or letters of commitment were obtained in approximately 3,200 reviews where contractor noncompliance was found. When conciliation has not been successful, the program has not hesitated to use formal enforcement procedures to achieve contractor compliance. I assure the Subcommittee that this policy will be continued.

In 1981, a conscious decision was made to eliminate the tremendous backlog of complaints. I understand that some complaints were so old that the complainants could not be located or were no longer interested. Now that this backlog has been eliminated, we are in a position to initiate investigations of complaints while the evidence is still fresh, and get relief for victims much more quickly.

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Finally, we have worked to change the long-held belief in the contractor community that if you had never been reviewed by the OFCCP your chances of ever being reviewed were slim. Our new selection procedures have had the effect of increasing the number of first-time compliance reviews. In FY 1984 OFCCP conducted 3,205 first-time reviews (or 62%) as compared to 460 (or 15%) of total reviews in 1981. OFCCP had conducted 2,507 first-time reviews at the end of the third quarter of this fiscal year, and projects completion of about 3,350 or 64% of total reviews by the end of this fiscal year.

Mr. Chairman, in summary, we believe that our testimony today demonstrates the strong commitment of the Labor Department under the Reagan Administration to the elimination of unlawful discrimination from the workplace. This commitment is reflected in the many actions taken by the Department to improve the enforcement of the Executive Order as well as the other contract compliance programs.

My associate and I will be pleased to answer any questions that you and the members of the Subcommittee may have regarding the administration of the Federal contract compliance program.

Mr. MARTINEZ. Yes. Mr. Cooper, you do not have a statement?

Mr. COOPER. No, sir, I do not.

Mr. MARTINEZ. I understand you've just been on board for 3 weeks.

Mr. COOPER. Basically, 4 weeks and still counting.

Mr. MARTINEZ. I can understand. And Ms. Meisinger, you've been Acting Chairman for the last 2 years?

Ms. MEISINGER. Twenty months, yes, prior to Mr. Cooper's appointment.

Mr. MARTINEZ. I guess you would be in a much better position to answer some of the hard questions.

I would simply ask, Mr. Cooper, in the 4 weeks you've been there, have you made any assessment yet and decided any direction that you choose to go in now that you're the Director?

Mr. COOPER. Well, basically, I think it's important to point out my management style. My method of operation is to come into a situation and listen and learn. Basically, that's where I'm at at this time. I'm still in the process of going through a series of briefings.

I think it's safe to say, however, that some of my initial observations clearly indicate that there is a need to improve and make some changes in the management system that currently exists within OFCCP. Ms. Meisinger, while she was in charge, made a number of improvements within the operation, but there is certainly room to improve even upon that.

I think there is a need to take a look at some of the training activities. We certainly need to get more involved in training our people, our field staff. We are—I feel that there's a need to take a look at expanding our outreach efforts to various constituency groups. That is an area that I'm looking at very stronglv and moving in that direction.

Those are some initial observations, and I really don't feel comfortable in going into any greater detail at this point in time.

Mr. MARTINEZ. I think that's sufficient.

From your testimony, Ms. Meisinger, it indicates that there hasn't been, for the lack of trying, an effort to really improve the whole operation there. Complaints persist that there isn't enough being done, and that there is a real lack of concerted effort. Judging from the fact that you testified that the backlog has been eliminated, leaves a little bit in question. If you've eliminated a backlog and you can act on complaints immediately, that's a great step in the right direction; because a lot of agencies still have and persist to have long, long, large backlogs which do not allow them to really handle situations in the proper time.

Ms. MEISINGER. I think the career staff deserve a round of applause for the efforts that they have expended to make sure that happens.

Mr. MARTINEZ. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman. I can't help but notice as I sit and look at the witness list, that we have represented here today the New York State Division of Human Rights, the American Jewish Committee, the U.S. Conference of Mayors, National Association for the Advancement of Colored People, National Women's Law Center, the Citizen's Commission on Civil Rights,

Lawyers' Committee for Civil Rights Under Law, Women Employed Institute, Women's Legal Defense Fund, et cetera.

Mr. Cooper, here's your chance. Can you give these people who are sitting behind you and who are obviously committed to the concept of true, equal rights and civil rights enforcement, to eliminating systemic discrimination within our Federal contract programs—can you give them some assurance that, when they walk out of this meeting, under your leadership you are going to effectively and strongly enforce the concept of affirmative action? Here's your chance. Speak to that.

Mr. COOPER. Well, thank you for the opportunity. Let me say that the bottom line, in terms of my interpretation of affirmative action, because I think that's important as it relates to OFCCP, as I see it, the bottom line is my job and the job of OFCCP should be to make certain that Federal contractors have an affirmative action program to assist minorities, handicaps, veterans and women. That is the bottom line.

We will make certain, under my leadership, that affirmative action takes place within the business community. I think it's safe to say that, while I cannot speak for the Secretary, he clearly is a man who possesses a great deal of concern and interest as it relates to this particular area. I think his track record is clear. Anybody wanting to know more about it, all one would have to do is look at his background.

He's committed to the program, and he's committed to affirmative action. When he hired me, he made it real clear to me that he wanted to make certain that affirmative action is adhered to.

Mr. GUNDERSON. One other question along this line. Then I'd like to do some more in terms of review of what has or has not been happening. To what degree can the two of you assure those sitting behind you of access to the two of you, to your policies?

Mr. COOPER. In terms of access, I have always—part of my management style is to have an open door policy, and that's not—that's a two way street. In short, simple language, people or any constituency group, any corporation will have access to me directly. In fact, one of the things that I've done within the 4 weeks since coming on board, I've made an attempt and I have met with a number of constituency groups and corporate representatives; and that program will continue.

Mr. GUNDERSON. There's been a lot of criticism that the OFCCP to date has not effectively enforced the Executive order on affirmative action in contract compliance. Can you respond to that criticism, either one of you?

Ms. MEISINGER. Clearly, I dispute that. I think that the almost doubling of the number of investigations that we've done belies that allegation. I am sensitive to the concern that some of the interest groups have, that the reason that we're doing more is because we're doing them too quickly and we're not finding what we need to find, which is one of the reasons that we developed a task force to look at the quality and to look at how long it takes to do a quality review. While, firstly, we don't have the full results of that sampling that we did of our universe, the early indications are that it takes as much time to do a quality investigation as it does to do a lousy investigation. So that I feel much more comfortable in

terms of ensuring that our people move promptly in conducting their investigations.

There will always be problems with quality. Anytime you have an agency that has over 900 people working in it, you're going to have variations in their performance. But it's something that we constantly work on and constantly monitor.

There is, in fact, a special group within the national office of OFCCP whose sole responsibility is to go out and do an accountability review, to check to see that the quality of the investigations is maintained, that the practices and policies dictated by the national office are adhered to, and that we go about doing our business in the most professional and efficient manner possible.

Mr. GUNDERSON. Something has got to be different. I assume you have had approximately the same budget consistently over the past few years. Is that correct?

Ms. MEISINGER. We have—in dollars, yes. In staffing, we have declined, as a matter of fact, although our 1986 budget proposal would reduce the staff by 42 One of the areas——

Mr. GUNDERSON. From what to what?

Ms. MEISINGER [continuing]. From 964 to 942, I believe, although I would have to double check that. I can correct that for the record. What we've tried to do with that reduction is shift some of the national office staff into the field and through reorganization we would project in 1986, depending, of course, on what Congress does in the budget—we would increase the number of investigators, so that there would be a pure increase in the number of investigators, even though the agency as a whole would reduce.

Mr. GUNDERSON. How do you explain, if your budget is constant and your number of review personnel is probably going down, how you have increased your compliance review significantly, 5,025 last year—you're expecting over 5,200 this year; in 1980 it was 2,600. You say you've not forsaken quality for quantity. Something rather unique is happening, apparently. Can you elaborate for us?

Ms. MEISINGER. There are a number of reasons. Obviously, I'd like to take total credit for it all, but that's not the case. The agency, by way of history, was—basically came to life in 1978 when 11 agencies of the contract compliance program was consolidated within the Department of Labor.

So the agency as a whole is in reality a young agency. I think, in part, the increase in the productivity and the activity by the staff reflects a maturation of the agency as a whole, getting the systems in place and the controls in place to monitor their activities.

We have spent a great deal of time tracking what the people are doing. And where in the past they have not had any limitations on the amount of time that they could allocate to any one function, we now monitor that time expenditure, and in so doing we encourage them to use their time efficiently. So I think it's a combination of the aging of the agency, putting in the tracking systems so that we can hold the people accountable, performance standards that dictate that they are accountable for how they spend their time, and a lot of hard work from a lot of career managers throughout the country.

Mr. GUNDERSON. One final question, Mr. Chairman, if I might. I'd like to ask a number of more, but let me just ask one at this

point in time. You indicate that to secure compliance by methods of conference, conciliation, mediation and persuasion is preferable; however, when that has not worked, you say that the program has not hestiated to use formal enforcement procedures. Can you give us any indication of what you've achieved in voluntary compliance consultation, and the number of cases where you've had to use some kind of formal enforcement mechanism?

Ms. MEISINGER. The number of--I believe it's roughly 3,000 and I can correct that for the record. For fiscal year 1984, 3,000 of the over 5,000 reviews resulted in resolution through a letter of commitment or a conciliation agreement of some sort where we have a written document where the contractor makes a commitment to comply, or where we may have obtained some relief, some remedy, for a victim of discrimination, if that is the case.

In terms of how—the first step in our going to an enforcement action, which would be through an administrative law judge and then proceeding to a hearing for ultimate debarment from doing business with the Government, is what we call a show cause notice, a letter of show cause, where we give the contractor 30 days to give us the information that we have demanded that they have not been willing to give us. I don't know what the number is there, but that would be the first step in terms of going for administrative sanctions.

For 1984 we had filed—we had requests filed with the Solicitor's office for administrative complaint 41 times, where we went to the Solicitor and asked them to begin the process with a complaint filed with the administrative law judge. Of those 41, 23 were filed. It is the first step in the process.

While the number of—one of the things that we found in 1980 and 1981: While there are a lot more administrative complaints requested where we went to the Solicitor's office, two things happen. For example, in 1981, 192 administrative complaint requests went to the Solicitor. Of those, 15 resulted in a complaint being filed.

We had a problem with some of the—not preparing a quality file to the Solicitor, so that they could actually file a case and go into court, as it were. Also, we found that as a matter of how we tracked what we did, when a case was sent to the Solicitor, the local office could count it as a closed case. So there were performance incentives to shift the work to the Solicitor's office. What we are trying to do is making sure that those cases that we refer to the Solicitor's office are quality cases so that they result in the Solicitor deciding to pursue it.

That's a long answer to a short question.

Mr. GUNDERSON. That's all. Thank you.

Mr. MARTINEZ. Along the same line, have there ever been any debarments?

Ms. MEISINGER. I believe there have been two debarments, one early in 1981 in March, I believe of 1981, and one within this last summer. I think the final publication in the Federal Register occurred within the last 4 week period. Since 1978, I believe—again, I would like to correct this for the record, if I may, if I'm inaccurate—there have been 10 debarments since consolidation in 1978.

Mr. MARTINEZ. Thank you. Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. Just a piggyback on that question you just raised: Is the low number of debarments—is this a reflection that the private sector is fully complying with all the nondiscriminatory and affirmative action compliance procedures?

Ms. MEISINGER. I don't think that is the case. I think what it is an indication of is that our staff is becoming more adept at what they do, that they are learning what is necessary to make a case so that when they sit down and attempt, as they're required to under the Executive order program, to conciliate and resolve the problem, it is less likely that the contractor is going to try and stonewall, because they will see that we're prepared and we're able to make a case. They are more willing to resolve it at that point.

Mr. HAYES. We understand the Inspector General's office made a study of the Office of Federal Contract Compliance Programs, its enforcement. Can you tell this subcommittee when the results will be; cleared by your office?

Ms. MEISINGER. Well, would that it were that we had the opportunity to clear the results of the IG investigation. The IG did an audit, and we were presented with that draft audit report. I think it was basically the first day Joe was on the job he received a draft report.

We responded to that last week. I don't know when the Inspector General will, based on their analysis of our comment on their draft, finalize their report.

Mr. HAYES. Is it your responsibility to notify this subcommittee of the results of that report?

Ms. MEISINGER. I believe that function is carried out by the Department, but I would be more than willing to set up any kind of briefings that you might feel appropriate once that report is finalized.

Mr. HAYES. Maybe I should direct my question to Mr. Cooper. Can you arrange to see that this subcommittee gets a copy of that report?

Mr. COOPER. Most certainly can.

Mr. HAYES. What's that, in 30 days or something?

Mr. COOPER. Most certainly. Are you referring now to the draft or the final report?

Mr. HAYES. The final report.

Mr. COOPER. Yes; no problem at all.

Mr. HAYES. All right. Now one other question. I noticed you said you had only been here 4 weeks. I don't want to be unfair. Like to give your plane at least a chance to land.

Mr. COOPER. Still flying.

Mr. HAYES. Do you support the current regulations of OFCCP which state (I quote):

> Goals may not be rigid and inflexible. Orders which must be met, but must be targets reasonably obtainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

Mr. COOPER. Sir, I do support the current Executive Order 11246. I do support that. It is law.

Mr. HAYES. Would you agree that regulations require flexible goals and not quotas?

Mr. COOPER. Would you mind rephrasing that?

Mr. HAYES. Would you agree that current regulations require flexible goals and not quotas?

Mr. COOPER. With all due respect, could I ask your indulgence in terms of refraining from answering that question at this time?

Mr. HAYES. I certainly want to grant you time to check it out and respond, but it is a question, I think, that has to be answered. But you have a big responsibility.

Mr. COOPER. Yes, sir.

Mr. HAYES. My last question, Mr. Chairman, is the administration suggests that current regulations discriminate against white men. Is there any proof of that? If so, where is it? I'd like to know.

Mr. COOPER. You're asking me or Ms. Meisinger?

Mr. HAYES. Asking you.

Mr. COOPER. Oh.

Mr. HAYES. You can defer to her.

Mr. COOPER. Well—I will defer to her.

Mr. MARTINEZ. Good thinking, Mr. Cooper.

Ms. MEISINGER. Could I ask you to restate the question.

Mr. HAYES. The administration suggests current regulations discriminate against white men. Is there any proof of that? If so, where is it?

Ms. MEISINGER. I'm really somewhat at a loss. I don't know where the administration has made that allegation. I don't know—I know there has been a concern that a program that results—that has a potential for resulting in selection of a nonqualified person is of concern, but I don't know that that has been a statement.

Mr. HAYES. If it is true.

Ms. MEISINGER. I'm not willing to concede that it is true, sir. I don't think I'm willing to say that that is true.

Mr. HAYES. If it is, would you agree or disagree with it?

Ms. MEISINGER. Well, if it's true, you have to agree that it's true.

Mr. HAYES. That they made this statement, that the administration has taken this position.

Ms. MEISINGER. I don't know that that's true. I really don't.

Mr. HAYES. If it was, would you agree or disagree?

Ms. MEISINGER. With the current program? I would not agree.

Mr. HAYES. Not agree.

Ms. MEISINGER. I don't know how the statement may have been made or not.

Mr. HAYES. Did you see current DOL laws?

Ms. MEISINGER. I'm sorry?

Mr. HAYES. Have you seen them?

Ms. MEISINGER. Seen current DOL laws?

Mr. HAYES. Yes. Department of Labor.

Ms. MEISINGER. I'm sorry?

Mr. HAYES. Department of Labor regulations.

Ms. MEISINGER. I mean, have I looked at our regulations? Yes, I have read our regulations.

Mr. HAYES. All right.

Mr. MARTINEZ. Thank you, Mr. Hayes. Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman. To Ms. Meisinger: You cite the dramatic increase in the number of complaints, investigations, and settlements. Then you go on on page 7 to talk about the settlements. How do your settlements compare to 1980? For exam-

ple, you talk about the compliance reviews relative to 1980 but not the settlements compared to 1980. Financially, are they the same? Number of employees affected, are they the same? Do you have any comparison on the settlements?

Ms. MEISINGER. Well, the settlements in terms of conciliation agreements. I believe, in 1980 the number was about 16 million for total financial settlements, and last year we were at 32 million. Now there is a big piece of that 32 which is attributable to a couple of individual cases, so that the numbers would appear to be somewhat skewed. But there has been an increase.

One of the things that we've found: While the dollars that are attributed to back pay would appear to have declined, what we're finding is that the field has not necessarily counted relief that has been awarded to an individual victim as back pay. They have included it someplace else within the statistics that we report.

We're very concerned that whatever our statistics—whatever we have is displayed as accurately as possible, and as a consequence we have realigned our reporting system for fiscal year 1985, so that we're pretty much consistent with the way EEOC counts dollar recoveries, and that is funds for individual victims.

Mr. HENRY. Since you've cleared up the backlog, too, obviously, you'll have less by way of back pay, which would then on the surface make it look like financial settlements have been decreasing but that would reflect a much more——

Ms. MEISINGER. That will have some role in it.

Mr. HENRY. Now how do you determine noncompliance? I guess that's my issue. How do you determine noncompliance? What are the measures you use?

Ms. MEISINGER. Well, basically, by entering into a contract with the Federal Government, the contractor makes a commitment to comply with certain provisions of our regulations. We basically investigate to see if they have complied with those provisions which deal with nondiscrimination and affirmative action.

Mr. HENRY. But how do you measure the compliance or noncompliance?

Ms. MEISINGER. In—well, to the extent that we finish an investigation and find that there's compliance with all provisions of the regulations, we issue a letter saying that we have found you in compliance.

Mr. HENRY. What are they complying with?

Ms. MEISINGER. With the regulations.

Mr. HENRY. And what do the regulations require?

Ms. MEISINGER. The regulations are quite voluminous. It has a number of requirements. For certain contractors over a certain size, they are required to post—to have a poster regarding their obligations. They're required to do all advertisements with an EEO tag on, and currently certain contractors are required to do analysis of their work force and, where—according to our regulations, they are required to set goals. That is one element within an entire affirmative action obligation.

Mr. HENRY. And it's whether or not they've met those goals in any measurable way that ultimately determines compliance or noncompliance. Isn't that correct?

Ms. MEISINGER. Therein lies the question. There have been allegations that that is how the program has been administered. The regulations speak to a requirement to demonstrate good faith effort.

Mr. HENRY. Right. And the good faith effort is shown by all the other things such as posting employment opportunities, in ads, personnel practices, posting in the plant, all that are good faith efforts; but your measurement of compliance ultimately has to be something that's measurable. That's where it breaks down. That's really what I want to pursue. How do you determine noncompliance? What flags it? You don't spend a lot of time if someone writes in and says, boy, in the employee's lunchroom there's not a poster up. I presume someone phones and says, get a poster up. They put a poster up, and the next day the employer says we've got posters up. That's really not the heart of the matter.

What are you really measuring compliance and noncompliance on? In the end, it comes to numbers, doesn't it?

Ms. MEISINGER. Some would argue that that is the case, but I don't think necessarily. I mean, we are—the staff is instructed to look at the good faith efforts, and if there has been recruitment outreach effort made to increase the applicant flow for women and minority, that is what we look for for compliance. To the extent that we don't find that poster, we may require through a letter of commitment or a conciliation agreement that the contractor commit to take care of that in the future.

Mr. HENRY. But I want to forget the poster now, because I really think in the end it's those numbers that show that there has been this attempt to reach out, presuming some kind of ability to in fact broaden the nature of that employee base. It does come down to a number in the end, and that's the handle. I guess that's what concerns me.

I don't have a copy of these presumed revisions to the Executive order. We phoned around a little bit yesterday but couldn't find anything. Most of the coming testimony is a little amorphous, because it talks about these presumed revisions to the Executive order. None of us have them. So it's a little speculative. But if, as it's been reported in the popular media, that we're taking away the criteria of measurement, that's what I'm concerned about; and I'm worried about how you determine compliance.

Compliance could then become much more arbitrary than it can sometimes become inadvertently by slipping into affirmative action goals that accidentally get into rigid quotas. I doubt if anyone on this committee—I don't think anyone on this committee, and I doubt if any of our witnesses really are advocates of the rigid quotas. The use of this word is very, very dangerous and misleading as well.

I simply have to caution you. I don't want to take anymore time, because this whole thing is so speculative; because I've got nothing on paper. But if you take away the tools of measurement, you can't measure compliance.

Mr. MARTINEZ. Except for the time constraint, you generate a great position for great debate. You know, a factor that wasn't even mentioned in that last eloquent statement he made, is the fact that geographic regions are different in numbers and percent-

ages of minorities. Some areas have none, and some have very small and some have very large. So how do you determine this in your office, by some measure of the percentage of the population in and around that particular facility?

Ms. MEISINGER. Currently, under current regs——

Mr. MARTINEZ. Is that spelled out in the regs?

Ms. MEISINGER [continuing]. Well, it speaks to where a contractor should look for available pool of applicants.

Mr. MARTINEZ. Thank you. Mr. Jeffords.

Mr. JEFFORDS. I'd just as soon yield to my friend to the right here, if you'd like to continue. I think you were getting right to the heart of the matter.

Mr. GUNDERSON. I'll be glad to yield. I was just going to write a note to the chairman that it's been nearly 6 months, and I've been burning up to talk to them.

Mr. MARTINEZ. The time is yours, Mr. Jeffords.

Mr. JEFFORDS. Fine. I share the same concern expressed by Mr. Henry, and that is how are you going to measure compliance if you don't have some sort of a goal or a concept of goal and that has to relate some way to numbers; and if that isn't somehow stated in your regulations or in your guidance, how are you going to be able to measure compliance in any meaningful term?

Ms. MEISINGER. Congressman, I'm just not willing or in a position to speculate on what may or may not happen in the future at this time.

Mr. JEFFORDS. Well, let's get back to the situation you find yourselves in now, as to how you measure compliance. Right now. Let's not worry about the future. How do you measure compliance, that someone has made a good faith effort to improve their hiring of minorities? Certainly, one measure is: Have you attempted in the sense of advertising, have you attempted in the sense of hanging up the right posters. But in the final analysis, all of that can be done without really making any improvement.

For instance, if that attitude does not permeate down to people that are actually doing the hiring so that all minorities can be sluffed off and then you can hire the nonminorities—and certainly the fact that you ran all the ads required and hung the right posters would certainly diminish in importance—the results would certainly seem to indicate that there really hasn't been a good faith effort. So how do you measure good faith in the terms of, if you don't go to numbers, or see improvement or see any increase in the percentages of what a person has done in the hiring of minorities?

Ms. MEISINGER. In the example that you cited where there were minority candidates who were not considered and were excluded, that would be an issue of discrimination and whether discrimination had occurred in their efforts to seek employment, to obtain employment. That would be something that we would look into, to find out if they were qualified and were excluded from that position based on race or sex. That is an ongoing process and a piece of every compliance review.

Mr. JEFFORDS. And if that fact of a number that came in and had not been hired was not apparent, you still would say that they—how would you measure compliance in that case?

Ms. MEISINGER. Well, in that case we would be looking to determine if there was discrimination.

Mr. JEFFORDS. How would you do that?

Ms. MEISINGER. Basically, we would look at whether employment decisions were based on qualifications, and at the time an employment decision was made, were there more qualified candidates who, because of race or sex, were excluded from consideration or not selected. If that is what we found, we would require that the contractor make remedy, make whole, for that victim of that discrimination through back pay or whatever.

Mr. JEFFORDS. I guess I still—I understand your dilemma, but it seems to me that if you don't have some measure that takes a look at increases in the number of minorities that are being hired or some improvement in percentages or numbers, that you're going to have a very difficult time ascertaining whether that plant or employer has been actually working in good faith. OK.

Mr. MARTINEZ. Thank you, Mr. Jeffords.

One last question from the Chair. Last June, I believe it was, in a hearing held by Mr. Hawkins there was evidence that there were going to be entered into some agreements with private contractors that would relieve them of the normal reporting process, and there would be self-monitoring reporting done by them.

He asked at the time that those kinds of things not be entered into, so that the information could be more generally public. Have you entered into any of those contracts?

Ms. MEISINGER. I believe you are referring to the discussion where we were requested not to enter into agreements with new contractors. We have not. We have amended an existing agreement with General Motors, basically reflecting some of the concerns that were expressed at that hearing, to make amendments to reflect some of the concerns that were brought up at that hearing. But we have not entered negotiations with any new contractors consistent with that commitment.

Mr. MARTINEZ. Is that the only one that exists?

Ms. MEISINGER. There are currently four agreements in existence.

Mr. MARTINEZ. Four?

Ms. MEISINGER. Yes.

Mr. MARTINEZ. You do not plan to enter into anymore of those agreements?

Ms. MEISINGER. We would not do so without consulting with this subcommittee.

Mr. MARTINEZ. All right. Thank you very much. Thank you both very much for appearing before us.

Ms. MEISINGER. Thank you for your time.

Mr. MARTINEZ. We appreciate your testimony here.

Ms. COOPER. Thank you.

Mr. MARTINEZ. At this time we will call the first panel. Douglas White, Hyman Bookbinder, and William McEwen. Gentlemen, your statements will be entered into the record in their entirety, and for the sake of the time constraint we're under, would you hold your testimony to 5 minutes and summarize your written testimony.

We can begin with Mr. White.

STATEMENT OF DOUGLAS WHITE, COMMISSIONER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

Mr. WHITE. My name is Douglas White, and I am New York State Commissioner of Human Rights and vice chairperson of Gov. Mario Cuomo's Executive Committee on Affirmative Action.

I note that the provisions—that these provisions that we are talking about today have been supported by four Presidents, two Republicans and two Democrats, since the enactment of EO 11246. Certainly, repeal of the compliance provisions would be a tragedy. It would have a devastating effect, both practically and symbolically.

Unemployment rates among blacks and Hispanics are double unemployment rates among whites. Wages are lower for women than men. The trickle-down theory will surely never work if there are fewer jobs and less money in families that need it the most.

In any discussion of 11246 and affirmative action, I believe we must grapple with the question of why we need affirmative action programs. After all, if discrimination against blacks, women, Hispanics, the disabled, is prohibited by Federal laws, why must we take any steps to hire or promote members of these groups? If we are all equal, why don't we treat everyone equally and ignore one's race, sex and consider only merit? Isn't affirmative action, as President Reagan, the Attorney General of the United States, and virtually all opponents would say, a form of preferential treatment?

Is it true that preferential treatment has become the norm, that blacks in particular and also Hispanics and women are getting all the jobs, and white males are getting the proverbial shaft? Well, as Harry Truman used to say, let's look at the record.

The facts of life in the real world destroy the myths about who's getting preferential treatment. For example, according to the 1980 census, only about 12 percent of the national population—of 12 percent of the national population, blacks comprise only 2 percent of the Nation's lawyers and 2 percent of the Nation's physicians. Certainly, this is not because blacks don't care about their health or legal rights.

Black professors comprise only 4.3 percent of the Nation's higher educational faculty. A 1980 survey of corporate managerial positions done by the Chicago Urban League found that 13,000 managers described as department heads or higher, only 117 were black. Of 1,700 senior corporate heads, only 3 were black.

Black median family income for the past decade has been only a bit more than half that of white families, and black unemployment rates have been consistently double that of whites. Further, black rates of official poverty are triple the white rate.

To the general public, these statistics may be a bit of a surprise, I imagine. Maybe that is because, when it comes to presenting these facts to the public at large, some statistics—some other statistics are relevant. The number of minority journalists increased fourfold over the last decade. However, minorities only comprise 4 percent of that profession, and two-thirds of the Nation's daily newspapers do not even have one minority professional. Some preferential treatment.

There is another important aspect to the lack of minority journalists. To ensure full and fair objective reporting, minorities must have their say in how news is reported in and about their communities and the world at large. Hispanics and blacks must be allowed to bring their gifts and experiences and viewpoints to the media, for the same reason we need women as Supreme Court Justices, to avoid imbalance and onesidedness.

As you know, the plight of Hispanics and the disabled is also distressing. In this day and age, women earn only 60 cents for every dollar earned by men.

Clearly, there has been a whole lot of preferential treatment going on, but it has been preferential treatment extended to white males, not to women, not to blacks, not to Hispanics.

Affirmative action efforts and programs, with their goals and timetables, are not expressions of preferential treatment for minorities. Rather, they are tangible, reliable and concrete measures against continuing preferential treatment for whites.

There are means of measuring actual progress toward the goal of eliminating preferential treatment for anybody. In the absence of preferential treatment favoritism and discrimination, numbers in employment, education, the professions, and all walks of life would tend to reflect the population ratios. Compliance efforts measure the extent to which they do just that.

Unfortunately, this attack on EO 11246 and affirmative action is consistent with the administration's policy of siding against minorities. I do not mean to state unequivocally that the Reagan administration always sides against minorities, but it sure seems that way. Again and again. And it's not just minorities. It is women and the disabled as well.

Witness the *Grove City* case where the Reagan administration supported the idea of Federal funds for schools that discriminate on the basis of sex. The administration's opposition to the Civil Rights Act of 1964, because, as they said publicly, it will require small mom and pop stores to be accessible to the disabled.

The most systematic study of the effects of the Federal Contract Compliance Program analyzed employment practices, over 77,000 worksites with a total of 20 million employees. It found that, from 1974 to 1980, the rate of minority employment grew 61 percent faster in companies covered by affirmative action than in other companies. The employment of women grew at an incredible 700 percent faster.

The study also said that in companies where the Government enforced affirmative action, women and minorities advanced from low-paying jobs to skilled, craft and white-collar positions at a significantly greater rate than in other companies. This was done by the Labor Department's Office of Federal Contract Compliance Programs, this study.

Another study for the Labor Department by Jonathan Leonard of the University of California at Berkeley reached a similar conclusion. It is significant to note these studies were ordered by the executive branch of the Government and not by the civil rights community.

It seems obvious that those rates of progress were to—if these rates of progress are to continue, we must close the gap between

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minority and white unemployment. On the other hand, if the progress is discontinued, we will widen the gap. The repeal of the compliance provisions of 11246 will end the progress and reverse the trend.

Mr. MARTINEZ. You have 1 minute to wrap up.

Mr. WHITE. Thank you. Leaving the general provisions against discrimination on the books and forbidding the Labor Department to measure contract compliance would be disingenuous.

That is why the compliance provisions—that these compliance provisions which were issued in 1965 were not voluntary. In fact, they were mandated. Given the negative attitude of the present temporary personnel at the White House, there is even less reason to believe they will work in 1985.

Besides the practical effect of the repeal of the compliance provisions of 11246, there is an important symbolic effect. After 40 years of civil rights gains with bipartisan support, it would be a major setback in the effort to achieve fairness and equality for all Americans. It is widely viewed as part of a scheme to reverse these four decades of progress.

The civil rights of Americans are under siege, and I hope that this subcommittee will help in doing something about that.

Thank you very much.

[The prepared statement of Douglas H. White follows:]

PREPARED STATEMENT OF DOUGLAS H. WHITE, NEW YORK STATE COMMISSIONER OF HUMAN RIGHTS

DOUGLAS H. WHITE
COMMISSIONER

My name is Douglas H. White. I am New York State Commissioner of Human Rights and Vice Chairperson of Gov. Mario Cuomo's Executive Committee on Affirmative Action .

Repeal of the compliance provisions of Executive Order 11246 would be a tragedy. It would have a devastating effect both practically and symbolically.

Unemployment rates among Blacks and Hispanics are double unemployment rates among Whites. Wages are lower for women than men. The trickle down theory will surely never work if there are fewer jobs and less money in families that need them the most.

In any discussion of E.O. 11246 and affirmative action, I believe we must gapple with the question of why we need affirmative action programs. After all, if discrimination against Blacks, women, Hispanics and the disabled is prohibited by Federal laws, why must we take any affirmative steps to hire or promote members of these groups? If we are all equal, why don't we treat everyone equally and ignore one's race or sex and consider only merit? Isn't affirmative action,as President Reagan, the Attorney General of the United States and virtually all opponents would say, a form of preferential treatment?

Is is true that preferential treatment has become the norm, that Blacks in particular and also Hispanics and women are getting all the jobs, and White males are getting the proverbial shaft?
Well, as Harry Truman used to say, "Let's look at the record."

The facts of life in the real world destroy the myths about who is getting preferential treatment. For example, according to the 1980 census, although they are about 12 percent of the national population, Blacks comprised some 2 percent of the nation's lawyers and about 2 percent of the nation's physicians. Certainly this is not because Blacks don't care about their health or legal rights. Black professors comprise only 4.3 percent of the nation's higher education faculty. A 1980 survey of corporate managerial position done by the Chicago Urban League found that of the 13,900 managers described as department heads or higher, only 117 were Black. Of 1,700 senior corporate heads, only 3 were Black. Black median family income for the past decade has been only a bit more than half that of White families, and Black unemployment rates have been consistently double that of Whites. Further Black rates of official poverty are triple the White rate.

To the general public these statistics are a bit of a surprise, I imagine. Maybe that is because when it comes to presenting these facts to the public at large, some other statistics are relevant: The number of minority journalists increased fourfold over the last decade however minorities still comprise only 4 percent of that profession and two-thirds of the nation's daily newspapers do not even have one minority professional.

Some preferential treatment!

There is another imporant aspect to the lack of minority journalists. To insure full and fair and objective reporting, minorities must have their say in how news is reported in and about their communities and the world at large. Hispanics and Blacks must be allowed to bring their gifts and experiences and viewpoints to the media for the same reason we need women as Supreme Court judges: to avoid imbalance and one-sidedness.

As you know, the plight of Hispanics and the disabled is also distressing. And in this day and age, women earn only 60 cents for every dollar earned by men.

Clearly there has been a whole lot of preferential treatment going on, but it has been preferential treatment extended to White males, not to women, or Blacks or Hispanics.

Affirmative action efforts and programs, with their goals and timetables, are not expressions of preferential treatement for minorities. Rather they are tangible, reliable and concrete measures against continuing preferential treatment for Whites. They are a means of measuring actual progress toward the goal of eliminating preferential treatment for anybody.

In the absence of preferential treatment favoritism and discrimination, numbers in employment, education, the professions and all walks of life would tend to reflect population ratios. Compliance efforts measure the extent to which they do just that.

I add here a point about the preferential treatment that President Reagan's administration is supposedly opposed to. The core of the administration's argument against affirmative action is that race, sex and national origin should never be considered in employment or admission to medical school, etc. Yet, when President Reagan had the opportunity to appoint a Justice of the U.S. Supreme Court, he appointed a woman. And no one can tell me that the fact that she is a woman was not considered in the decision to appoint her.

What's sauce for the goose, is sauce for the gender.

Now if the President can take an applicant's sex into consideration in making an appointment to the Supreme Court, an appointment to a job that has perhaps as great an influence upon the lives of both living Americans and Americans of future generations, why can't employers? Why can't they take an applicant's race, sex, disability or national origin

into consideration and fill the job with an applicant who is a member of a group that has historically been discriminated against and denied an equal opportunity?

The point is an employer can take those factors into consideration when choosing from among a group of applicants who are qualified for the job. And the U.S. Supreme Court has upheld that principle more than once.

Unfortunately this attack on E.O. 11246 and affirmative action is consistent with this administration's policy of siding against minorities. I do not mean to state unequivocally that the Reagan Administration always sides against minorities, but it sure seems that way. Again and again. And it's not just minorities, it's women and the disabled as well. Witness the Grove City case where the Reagan Administration supported the idea of Federal funds for schools that discriminate on the basis of sex, and the administration's opposition to the Civil Rights Act of 1984 because, and they said this publicly, it would require small mom and pop stores to be accessible to the disabled.

In discussing the historic Civil Rights Act of 1964, the late Senator Hubert Humphrey said that it does little good to pass a law prohibiting a restaurant owner from refusing to serve Blacks, if Blacks do not have enough money to eat in the restaurant. Affirmative action, in the long run, seeks to assure that everyone will have an equal opportunity for full equality.

The most systematic study of the effect of the Federal Contract Compliance Program of E.O. 11246 analyzed employment practices at 77,000 work sites with a total of 20 million employees. It found that from 1974 to 1980, the rate of minority employment grew 61 percent faster in companies covered by affirmative action than in other companies. The employment of women grew an incredible 700 percent faster.

The study also said that in companies where the government enforced affirmative action, women and minorities advanced from low paying jobs to skilled, craft and white collar positions at a significantly greater rate than in other companies.

This study was done by the Labor Department's Office of Federal Contract Compliance Programs. Another study for the Labor Department, by Jonathan S. Leonard of the University of California at Berkerly, reached a similar conclusion. It is significant to note that these studies were ordered by the Executive Branch of the Government and not by the civil rights community.

It seems obvious that, if those rates of progress were to continue, we could close the gap between white and minority unemployment. On the other hand, if that progress is discontinued, we will widen the gap. The repeal of the compliance provision of E.O. 11246 will end the progress and reverse the trend.

Leaving the general prohibitions against discrimination on the books and forbidding the Labor Department to measure contractor's compliance would be disingenious.

What is necessary for the proper functioning of society is mandated, not optional. Paying taxes and stopping at red lights would hardly work if they were voluntary. Neither will recruiting, hiring and promoting women and minorities. That is why the compliance provisions were issued in 1965, because the voluntary approach did not work. Given the negative attitude of the present temporary personnel at the White House, there is even less reason to believe they will work in 1985.

Section one of the proposed new Executive Order says its goal is "to further the purposes of E.O. 11246 which mandates that contractors with the federal government not discriminate". Words have meanings. What is mandated is ordered or required. What is voluntary is just the opposite. It is ludicrous to claim you can "further" the purposes of a mandate by making it voluntary, by taking the teeth out of compliance procedures.

One cannot help but be reminded of the conversation in Alice in Wonderland:

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master -- that's all."

Besides the practical effect of the repeal of the compliance provisions of E.O. 11246, there is an important symbolic effect. After 40 years of civil rights gains with bipartisan support it would be a major setback in the effort to achieve fairness and equality for all Americans. And it is widely viewed as part of a scheme to reverse four decades of progress. The civil rights of Americans are under siege.

Under the leadership of Governor Cuomo, New York State has launched the most comprehensive affirmative action plan ever adopted by any State in the Nation. But the problem is so huge that the states cannot do it alone. Our citizens need and deserve the help of the Federal government.

The argument that government actions cannot change the hearts of its citizens has frequently been disproven, and the effect of E.O. 11246 is a case in point. Not only has it brought thousands of women and minorities into the mainstream by giving them the opportunity to prove themselves, but it has reduced discrimination and acrimony throughout the land. Its successful implementation turned many doubters into strong supporters. These converts were responding to the inspirational leadership provided by both Republican and Democratic Presidents over the last 40 years.

But the power of the White House works both ways. Repeal of the compliance provision of E.O. 11246 would be a retreat, both symbolically and in practice, from the national commitment for equal opportunity for all. To some it would signal permission to return to an era in which a blind and indifferent government allowed discrimination to fester and to poison relations among Americans.

Rhetoric and "constructive engagement" will be no more effective in the U.S. than in South Africa.

The compliance provisions of E.O. 11246 have proven their value. They deserve to be continued, not weakened.

Mr. MARTINEZ. Mr. Bookbinder.

STATEMENT OF HYMAN BOOKBINDER, WASHINGTON REPRESENTATIVE, THE AMERICAN JEWISH COMMITTEE

Mr. BOOKBINDER. Thank you. Mr. Chairman, may I say as good-naturedly as I can to Mr. Gunderson that your plea to us not to discuss the pending order but only to look at the records of the office will fail, because it is the issue that must be discussed. It cannot be divorced from a look at what is going on today, as your hearing has already demonstrated. And it cannot be divorced from the kind of things we heard said only yesterday by the Attorney General.

In my judgment, Mr. Chairman, I think that yesterday's comments by Mr. Meese will only further confuse and distort the real issue facing us at this time, whether the reported outlawing of current affirmative action programs including the use of nonpreferential goals and timetables techniques is justified.

Rigid, exclusionary preferential quotas are wrong, and we have said so many times; but that has never been Government policy, and it is not the issue today. Mr. Meese does the cause of public debate no service when he compares emotional support for affirmative action with justification of slavery. That will not help us one bit

Mr. Chairman, I come here today to make a very simple statement about a very crucial truth. That truth is that there has been some very significant progress in our national goal of equal employment opportunity, but not nearly enough to permit a dismantling of the tools we have developed to achieve that progress.

The reported draft of changes in Executive Order 11246 would constitute such a dismantling, and we have, therefore, called upon President Reagan to reject the proposed changes.

These changes would significantly exacerbate an already disturbing situation created by the administration's action earlier this year requesting 51 local jurisdictions to modify their ongoing affirmative action plans. That action has caused much confusion and much resistance and resentment by local officials, both Republican and Democratic.

Now the next basic comment I want to make, which has already been said by others, is that racial or religious or other quotas are wrong and should not be mandated or permitted by law or regulation, but the use of statistical tests or goals are not necessarily improper and have, in fact, been very helpful. I think the data is available to show that.

Now I do not challenge the basic integrity of the administration. I agree—let me stipulate that I believe the administration wants equal opportunity as much as anybody else; but actions like the ones I've cited have indeed led many civil rights advocates and organizations to challenge the very integrity of this administration. So the appeal must go out from this subcommittee and others to the administration: Avoid the kind of mistake you made in the Bob Jones situation.

My intimate contact and daily activity with civil rights advocates in this country and in this city tells me that the tensions already

developed by the suggested draft order have led to resentment and resistance at least equal to that caused by the fiasco known as Bob Jones.

So we have to be very, very careful. No the difficulty has resulted, of course, over the years by confusion between goals and quotas. I can tell from the comments made by almost every member of this panel that you do understand the difference between goals and quotas, but many people in the country do not. Many people believe that there is no difference philosophically or conceptually between the two, and I would hope that this subcommittee and this report can help educate the American people in that regard.

It explains the really unwise comments made by the Attorney General yesterday. Now some of you have said that you have not had the benefit of looking at the draft order. Neither have I not officially in any use. But, gentlemen, is there any question in your mind but that this administration for 4 years has been talking now about the need to eliminate the requirement for statistical techniques?

I heard Mr. Reynolds say that to me 1 month after he took office, and that has been the basic philosophy. So this hearing is very important. If between you and us who are testifying we can say to the administration, don't make this mistake of eliminating goals, of eliminating effective affirmative action, it will be a hearing that was worth having.

Mr. MARTINEZ. One minute.

Mr. BOOKBINDER. One minute. Oh, how can I say everything I want to say in 1 minute?

I'll try to say this and, hopefully, get a question or two that will permit me to go on.

Look, I'm not unaware of the problem which has led to this confusion and these suggestions which have to be, in my judgment, put aside. It is true that a goal can become perverted, distorted, into a de facto quota. And there have been some such cases. There have been enough such cases to cause concern, and we have to look to that question. We have to look to that problem. But in my judgment, and it's a judgment based upon research that I've encouraged others to do, and I've looked at the research available, there is no factual data that would substantiate the charge that goals have become quotas to such an extent that it warrants throwing out the proverbial baby with the bath.

There are anecdotal references, and I know that if anecdotes keep adding to anecdotes, you have a body of data; but you cannot let anecdotal cases—everybody has an uncle or a sister-in-law who had difficulty getting a job. Such anecdotes cannot be the basis for very critical action.

There is evidence, evidence that I hope we'll hear from the next witness—there is evidence that in fact companies, corporations have said that goals have not been perverted into quotas, by and large, and it's our job here to protect what is good but to take necessary action against every distortion of goals programs.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Bookbinder.

[The prepared statement of Hyman Bookbinder follows:]

PREPARED STATEMENT OF HYMAN BOOKBINDER, WASHINGTON REPRESENTATIVE OF THE AMERICAN JEWISH COMMITTEE

On behalf of the American Jewish Committee, I appear today to discuss a simple but very crucial truth:

** There has been some very significant progress in our national goal of equal employment opportunity -- but not nearly enough to permit a dismantling of the tools we have developed to achieve that progress.

The reported "draft" of changes in Executive Order 11246 would constitute such a dismantling and we have therefore called upon President Reagan to reject the proposed changes. On August 15, Mr. Howard Friedman, president of the American Jewish Committee, in a letter to President Reagan, declared that the proposed action would be a "needless and ominous over-reaction to occasional abuses which have developed -- (and) would cause a chilling effect over all affirmative action programs." (Full text of letter attached -- see Appendix A)

This proposed change would significantly exacerbate an already disturbing situation created by the Administration's action earlier this year requesting 51 local jurisdictions to modify their ongoing affirmative action plans. That action, as we have all come to know, caused much confusion and anxiety across the country, and resulted in anguished protests from local officials, both Republican and Democratic. On that earlier occasion, Mr. Friedman again spoke out, expressing our concern that the Department's action "will reopen old wounds, and will have the effect of increasing tensions and disrupting social peace in communities across the country." (See Appendix B)

Mr. Friedman's comment at the time, that the Justice action "sweeps into a common ambit decrees which employ goals and timetables (the prudent use of which we strongly endorse) as well as decrees which employ quotas", applies just as clearly to the present proposal for changes in Executive Order 11246. Thus, let me state a second simple but very critical truth, as we profoundly believe it:

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** Racial or religious or other quotas are wrong and should not be mandated or permitted by law or regulation -- but the use of statistical tests or goals are not necessarily improper and have in fact been very helpful.

In challenging these two developments -- the second of which I realize is only a proposal at this time -- I do not challenge the intent or the good faith of the Administration. I do not doubt its desire to see further progress in equal employment opportunity, and I do understand their concern about occasional abuses and distortions which have developed over the years in the affirmative action picture. But there are many civil rights advocates and organizations that are so upset about these developments that they have challenged the very intergrity of the Administration. In the weeks since the report of the proposed order, I have sensed an intensity of concern and resentment at least equal to that which developed after the unfortunate Bob Jones action several years ago.

The American Jewish Committee, let me repeat, is strongly opposed to quotas. On numerous occasions, I have testified before Congressional committees explaining in detail why we oppose inflexible, mandatory quotas in both employment and education. I will not elaborate on that absolute commitment we have in opposition to quotas; we consider them wrong in principle, bad in practice, destructive of individual rights and contrary to the best interests of all Americans, including the disadvantaged. To those who argue that quotas are necessary on a short-term basis to remedy entrenched patterns of discrimination in our workforce, our response is that their inherent dangers outweigh any temporary gains they might bring. Quotas are qualitatively different from

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other forms of race-conscious relief and their use undermines the concept of individual merit and the very principle of equal opportunity itself.

But the issue of quotas is not really involved in the present dispute over Executive Order 11246. If it were, I would now be testifying in support of the proposed changes. In the name of fighting quotas, the draft order would prohibit the use of forms of affirmative action which have, based on all available data, operated in beneficial and constitutionally acceptable forms for two decades.

Not only does the present Executive Order not authorize the use of quotas, it expressly prohibits them. Let me cite the exact words, from Revised Order No. 4, the instruction to contracting agencies in implementation of Executive Order 11246:

> " (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."

What could be clearer than this instruction? It is most discouraging to find journalists and public officials and others, despite this clear language, continuing to describe the Executive Order as requiring quotas. Thus, if the proposed changes are intended to outlaw quotas, the answer is simple: they are now outlawed.

But the situation is not that simple, of course. There are those who refuse to see any difference between quotas and goals, insisting that it is just a semantic quibble. A careful study of the history of affirmative action and a careful reading of the relevant materials should be persuasive that there is indeed a major philosophical and operating difference between the two. Briefly

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stated, a quota involves a set-aside, an exclusionary number or percentage, available for members only of a named target group; it implies preference for such members over those outside the target group. Failure to reach the particular number or percentage is prima facia evidence of failure and possibly cause for sanctions of some kind.

"Goals and timetables" on the other hand, as defined in the Order No. 4 cited earlier, "should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus, in establishing the size of its goals and the length of its timetables, the contractor should consider the results which could reasonably be expected from its putting forth every good faith effort to make its overall affirmative action program work." No preference is required, and no penalties if good faith effort can be demonstrated.

Thus, goals/timetables can and do serve to provide a measuring rod for meeting reasonable, realistic objectives -- and also as a prod to employers to engage in a wide range of non-controversial affirmative action measures (recruiting, advertising, training, improved testing) in order to meet stated goals.

But there is another kind of opposition to goals which merits serious and even sympathetic hearing. Yes, some will argue, there is indeed a conceptual difference between a quota and a goal. But in practice, they contend, the difference has disappeared. Goals have become defacto quotas in so many instances that in order to avoid quotas, with its inevitable racial or other preferences, you have to say no to goals also. This is, of course, the rationale behind the Administration's policies.

It is the position of the American Jewish Committee -- a position supported

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only last week by the Task Force on Domestic Concerns of the National Jewish Community Relations Advisory Council, an umbrella group of 12 major national Jewish agencies and 200 local community relation councils -- that there is no factual basis for this assertion that goals have generally been distorted into defacto preferential, exclusionary quotas, that goals programs continue to serve as useful tools for affirmative action, and that therefore the draft proposal to outlaw goals is unwarranted and unnecessary and unwise.

I stress the absence of broad factual evidence of general corruption of goals programs. That does not mean that there have not been instances of such corruption. But anecdotal citations cannot be sufficient justification for sweeping changes in a federal program that has contributed to progress. To yield to such anecdotal evidence is to succumb to ideologues in and outside the Administration determined to score a philosophic victory.

Mr. Chairman, I urge you to listen to those across the land who are not insensitive to the underlying philosophical arguments about quotas and preferential treatment, but who are deeply involved in the realities of employment operations and equal opportunity aspirations. It is hard to exaggerate the importance of testimony offered by Mr. William McEwen, Director of Equal Opportunity Affairs for Monsanto Company, on behalf of the National Association of Manufacturers -- testimony that so much parallells what I have said to you this morning, that goals are not the same as quotas, and that they have been good for our nation's manufacturers, not bad.

I ask you to weigh heavily the editorial judgment of Business Week which concludes with these words:

" Over the years, business and regulators have worked out rules and procedures for affirmative action, including numerical yardsticks for sizing up progress that both sides understand. It has worked and should be left alone. "

And this distinguished business journal reminds its readers that Reagan Administration officials can often be heard saying, "If it aint brake, don't fix it." Take that advice in regard to affirmative action, Business Week urges.

I stated above that anecdotal arguments are not sufficient for underlying changes in programs considered useful. But that does not mean they should be ignored either. There have been enough cases reported -- some of them involving court action -- to have led to a widespread public impression that we are indeed moving rapidly to a quota society. Resentments have developed over the widespread use of preference, leading to general suspicions about any kind of affirmative action. Needless to say, any individual or group that believes that affirmative action has led to a new form of discrimination is entitled to full administration and judicial review and relief. Any violation of constitutional rights -- even if only a single individual is involved -- must concern us all.

It should be clear that any victim of discrimination -- "reverse" or traditional -- can today use the courts and the federal agencies to seek relief. But the American Jewish Committee has always urged, and I do so today, that if there are indeed abuses from a program which the government itself has mandated, it is particularly incumbent upon the government to take steps to prevent or at least reduce the level of such abuse.

If we ask, as we do, that the proposed changes in the order be rejected by the President, we also have the right to ask, and we do, that a full review of the program be made to the end of promulgating additional regulations, to

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prevent the distortion of goals into de facto quotas resulting either from ignorance or over-zealousness.

And, finally, we have the obligation to seek as much information as possible about how the present programs are working. If the "anecdotes" do add up to a substantial record of corruption, it may be necessary and only fair to modify our present position. I repeat our call for more thorough research into the actual performance of affirmative action programs. But until and unless such data does indeed validate the argument that goals inevitably become quotas, we ask the Administration and the Congress not to throw the proverbial baby out with the bath water.

I said at the beginning of this statement that there has been progress in the equal opportunity picture. Yes, there has. But not nearly enough. The employment figures for last month were most welcome in that they reflected a reduction in unemployment after several months of stagnation. But those figures caused no cheers in Black or Hispanic America, and especially none among the youth in those communities. Affirmative action alone -- even the unacceptable use of quotas -- cannot make a serious dent in unemployment rates as high as 20 or 30 or 40 percent. Basic economic growth, improved education, greater family stability -- these and other factors will ultimately determine the employment prospects for all our people. But discrimination continues to be a challenge, and we dare not let up on our efforts, both public and private, to fight it.

In a Forward to the excellent report of the Potomac Institute, "Affirmative Action in the 1970's", Harold Fleming cogently sums up that challenge, and I am pleased to endorse his words:

> " (Affirmative Action) has moved our society measurably closer to the democratic goal of equal opportunity... The gap remaining is too wide to justify relaxing our efforts and abandoning methods of proved effectiveness. If there are flaws in the execution of these methods, then by all means we should correct them. But let us not use them as a pretext for returning to the complacent and unfruitful policies the past."

APPENDIX A

The American Jewish Committee

Institute of Human Relations • 165 East 56 Street, New York, N.Y. 10022 • 212/751-4000 • Cable Wishcom, N.Y.

OFFICE OF THE PRESIDENT

August 15, 1985

President Ronald Reagan
The White House
Washington, DC 20500

Dear Mr. President:

The American Jewish Committee urges you to reject the proposed executive order to bar the use of numerical goals and timetables in the administration of Labor Department affirmative action programs for Federal contractors. This would be a needless and ominous over-reaction to occasional abuses which have developed in some of these programs. It would cause a chilling effect over all affirmative action programs and would threaten to undo the progress which has taken place in the last 20 years. The civil rights community will and should be deeply concerned over the far-reaching consequences of this proposal.

The basic problem with the pending order is that it fails to make the important and demonstrated distinction between "quotas" and "goals." The American Jewish Committee for two decades has strenuously opposed the first because it seeks to fight one type of discrimination with another, but it supports the judicious use of "goals" as an appropriate tool for measuring progress in equal opportunity programs and as a prod to effective monitoring of such programs. There is an impressive record of progress under such "goals" programs, as administered by both the Republican and Democratic administrations over the last 20 years. Where "goals" programs have been distorted into de facto "quotas," the answer must be rigorous supervision and correction, not the eradication of the programs themselves.

We believe your Administration should reject the blanket elimination of "goals" programs. Instead, we urge you to initiate consultations with all relevant groups to seek a consensus on affirmative action which avoids the dangers of discriminatory quotas but which can continue to produce needed improvement in employment of minorities and women.

Sincerely,

Howard I. Friedman
President

HIF:dw

HOWARD I. FRIEDMAN, President • • DAVID M. GORDIS, Executive Vice-President
THEODORE ELLENOFF, Chair, Board of Governors • ALFRED H. MOSES, Chair, National Executive Council • ROBERT S. JACOBS, Chair, Board of Trustees •
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APPENDIX B

5/25/85

THE AMERICAN JEWISH COMMITTEE

STATEMENT ON THE JUSTICE DEPT'S AFFIRMATIVE ACTION POSITION

BY HOWARD I. FRIEDMAN, PRESIDENT

In response to its reading of the decision of the United States Supreme Court in Firefighters Local Union No. 1784 v. Stotts, the Department of Justice has asked approximately fifty cities, counties and states to seek modification of affirmative action decrees which employ numerical goals and/or quotas in order to increase employment of minorities and women. These decrees related principally to police and fire departments.

This action by the Department of Justice is based upon its conviction that the Stotts ruling restricts "make-whole relief only to those who have been actual victims of illegal discrimination." The holding of Stotts is that an employer may not lay off employees with greater seniority in favor of employees with lesser seniority, in the face of a bona fide seniority system, merely for the purpose of preserving a certain racial percentage in the work force. The effect of the ruling on initial hiring practices is not clearly stated in the opinion and the language relied upon by the Department of Justice is not dispositive of the larger question.

The action of the Department of Justice has been perceived as an overly expansive interpretation of Stotts and has been productive of serious communal stress in communities which have been operating under existing court decrees. Most of the governmental units affected have challenged the Justice Department's position and have rejected the request to seek modification of the applicable court orders and consent decrees.

The American Jewish Committee is concerned over the action of the Justice Department not only in its inter-group relations aspect, but also in the manner in which the Department is seeking further development and clarification of the law. We have long made clear our profound opposition to racial and minority quotas and we reiterate that position. We have also expressed our support of the prudent use of responsible, realistic and flexible goals and timetables to measure affirmative action progress. We do so as a result of our conviction that it is sound public policy to advance growing numbers of minority people in the workforce generally, particularly in areas not historically characterized by

(over)

significant minority employment. The action of the Justice Department sweeps into a common ambit decrees which employ goals and timetables, as well as decrees which employ quotas. Hence the Department's action blurs the important distinction between the two.

We support responsible efforts to secure clarification of the law in this area. That objective is not served by dragnet approaches which overstate the scope of existing decisions and seek retroactively to change existing decrees based upon an assumed change in the law. It would be far more effective and less disruptive of sensitive communal concerns to pursue the development of the law in this area in the traditional fashion - namely, a case-by-case development of the contours of the applicable law. And the law is not yet where the Justice Department considers it to be, as underscored by the fact that the Supreme Court has, since Stotts, declined to review several lower court rulings which are in apparent conflict with the Justice Department's expansive interpretation of Stotts.

As a practical matter, we believe that the drive by the Justice Department to reopen these settled cases will reopen old wounds, and will have the effect of increasing tensions and disrupting social peace in communities throughout the country. We urge the Justice Department to reconsider this action. Instead, we recommend that the Department press its views vigorously in future cases where quota remedies are at issue.

May 1985
85-620-55

Mr. MARTINEZ. Mr. McEwen.

STATEMENT OF WILLIAM S. McEWEN, DIRECTOR, EQUAL OPPORTUNITY AFFAIRS, ON BEHALF OF THE MONSANTO CO.

Mr. MCEWEN. I love having gauntlets thrown my way.

Thank you, Mr. Chairman, members of the subcommittee, for allowing me to speak. I'm William McEwen, director of equal opportunity affairs for the Monsanto Co. I've testified before the full committee in another capacity, but today I'm testifying on behalf of Monsanto.

You do have the written testimony that I've submitted. Therefore, I won't bore you repeating most of it, but I would like to make some highlights.

One of the points that I would like to make, speaking on behalf of industry—and it's rather unique. I'm accustomed to being a minority, and here I am a minority again. I guess I'm the only one representing business.

On the other hand, what I would like to say is this: Business has learned to live with the Executive order program. Executive Order 11246 is a program that has its frailties, but there's nothing wrong with the Executive order, and most of the confusion and the conversation that's been around it have been somewhat misguided.

For instance, if you take a very close look at the Executive Order 11246, there is not one mention of goals or timetables in that Executive order. It does not mention goals and timetables. Goals and timetables are mentioned in the implementing regulation.

Therefore, if goals and timetables are being confused as quotas, why are we messing with the Executive order? It's the implementing regulations that are the problem. There's nothing wrong with the Executive order; and if it's not broken, don't fix it. That's the first point.

The OFCCP—members of the OFCCP have testified as to the effectiveness of the OFCCP and what they're doing. I thought it was rather unique, Mr. Gunderson's pursual of the new math—or Mr. Henry, one of the two of you. I don't mean that you look alike. It's just that I don't remember which one said it. But pursuing the whole concept of how they could do more with less is a question that is rather unique. I thought it was rather unique, the answer you got.

I want to try to clarify that answer for them. But speaking as a contractor, we are measured simply as the regulations state right now. Our work forces are scanned as it relates to the representation of protected and nonprotected members. That representation is then compared with the representation of those types of people in the affected labor force, and where there's a difference in the two, we establish goals and timetables for getting the representation on the labor force somewhat to mirror the representation.

Now at the beginning of the Executive order program there were in there, and there still are in there, the provisions for good faith effort. Part of what has happened is those provisions have gradually been bastardized to the point that you're almost guilty until proved innocent, and the whole concept of good faith effort sometimes is abused, and we look only at statistical progress. Statistical

progress doesn't always tell the whole story, because in many cases it's a snapshot in time. And what you don't see is what happens in between those statistical distances.

To make a long story short, what I'm trying to say is that we do have problems with the implementing regulations—we in business; because we have to live with them. There are some areas where they can be refined. But as far as Executive order is concerned itself, we don't believe—many of us don't believe that there is a need to revise the Executive order.

From a cost-benefit standpoint, and I don't think anyone has mentioned that—I will try to get off the emotional thing to talk just about cost benefit, as far as we are concerned. One of the things that has happened is, in the 3 years that we haven't had a head of the Office of Federal Contract Compliance Programs, real or imagined, some States have decided that there's a vacuum that the Federal Government has not been filling that is traditionally filled. So many of these States and local organizations have promulgated their own Executive order program, their own contract compliance programs.

One of the things that we find very alarming is the what if. What if sometime in the near future we in business find ourselves worse than in 1978 when we had eleven different agencies to deal with? What if we had 50 different sets of contract compliance, all variations on a theme, all requiring reporting and so on, rather than the Federal umbrella that we have right now? What if we had to do that? And not to mention the municipalities that we have to deal with.

Kind of tongue in cheek, we've just taught the Federal investigators how to come into a company and really evaluate us. All that is going to have to be redone. We're going to have to teach 50 new sets of people, plus whatever is left of the OFCC program. We're going to have to retool for that. I mean, there is a cost-benefit factor that should be looked at that's not being looked at in terms of the—and I think that that's one of the things that we're not really looking at.

What I want to do is—most of the other panelists—and you'll have other panelists who are going to be talking about the more conventional and emotional parts. I want to leave the time that I have left or the time that this panel has left for questions that you might have of us regarding our written testimony.

Mr. MARTINEZ. I would like to apologize to the other panelists. I just let you go 2 minutes over. You had me mesmerized.

[The prepared statement of William S. McEwen follows:]

PREPARED STATEMENT OF WILLIAM S. MCEWEN, DIRECTOR, EQUAL OPPORTUNITY AFFAIRS, THE MONSANTO CO.

Mr. Chairman and members of the Subcommittee, I am William McEwen, Director of Equal Opportunity Affairs with Monsanto Company. Monsanto is a multinational diversified corporation with over 150 manufacturing plants, laboratories and technical centers in 20 countries. Headquartered in St. Louis, Monsanto is engaged in researching, manufacturing and marketing a widely iversified line of chemical and agricultural products, man-made fibers, electronic materials, biological products, and high-gross engineered goods and systems. Monsanto has 37,000 employees in the United States and 13,000 employees internationally.

I. Introduction

The Monsanto Company believes affirmative action has been, and is, an effective way of ensuring equal opportunity for all people in

the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included. Doors of opportunity have been opened to many qualified persons, who, absent affirmative action, might never have achieved the level of success they enjoy today.

The benefits of affirmative action have accrued not only to individuals of all creeds, colors and sexes, but also to business and society. Diversity in workforce participation has produced new ideas, opinions and perspectives in management, product development and marketing. Efforts in the areas of recruitment, hiring and promotion by corporations have led to improvement in job satisfaction, labor management communication, productivity and community relations.

Certainly business' efforts to include all sectors of the American population in the workforce cannot account for all the significant progress which has been achieved since the passage of Title VII of the Civil Rights Act of 1964. Economic growth, enhanced educational achievements by minorities and women and job training have played a pivotal role in the workforce diversity we see today. The strides made by women and minorities have been significant during the past two decades, but the battle to ensure "colorblind" and "sexblind" employment opportunity is far from over. The bulk of the progress has been made in incorporating minorities and women into entry level and middle management positions. Much more must be done to ensure that opportunity exists at all levels.

For the past two decades, industry, Congress and the various agencies charged with enforcement of civil rights law have grappled with how equal employment opportunity can be achieved. Errors have been made. Successes have been achieved. As we look to the decade ahead we should build on our experience.

Industry is committed to affirmative action as it applies to outreach, recruitment, counseling and training activies designed to assure that qualified minorities and women are considered for employment opportunities. NAM opposes quotas in whatever form manifested. Quotas do not benefit business, society or minorities and women. Tokenism can only create poor employee morale, reverse discrimination and an environment where even qualified minorities and women are viewed with skepticism, rather than respect based on their abilities.

As the debate on affirmative action has emerged in recent years, much attention has focused on goals and timetables versus quotas. Industry does not believe that numerical goals for minority inclusion in the workforce, by themselves, constitute quotas. Business, particularly big business, sets goals and timetables for every aspect of its operations -- profits, capital investment, productivity increases and promotional potential for individuals. Setting goals and timetables for minority and female participation is a way of measuring progress and focusing on potential discrimination.

Industry recognizes, however, that goals and timetables can become masks for rigid quotas. We oppose any regulations that turn positive programs for measuring progress into unweilding rules on the number of minorities and women who must encompass the workplace. Yet, voluntary goals set by corporations for workforce participation should not be viewed as eroding equal opportunity objectives. These goals are merely a recognition that ingrained prejudices remain in our society. Assuring equal opportunity, at least for the next few years to come, means we must be ever vigilant in facing these prejudices and overcoming them. With this is background, we will discuss some of the reasons for continuation of affirmative action programs and the direction we think enforcement of civil rights laws should take in the future.

II. Enforcement of Affirmative Action

Twenty years of exposure to affirmative action enforcement statutes have provided employers with an insight into some of their problems. After two decades, it is time to refine affirmative action procedures in order to make them less onerous and more effective.

A major problem that exists in the enforcement area is the lack of a cohesive and comprehensive federal civil rights policy. Employers are getting mixed signals from the various federal aencies with civil rights enforcement jurisdication--the Equal Employment Opportunity Commission (EEOC), Office of Federal Contract Compliance Programs (OFCCP), the Justice Department and the Civil Rights

Commission. Conflicting standards and unnecessary paperwork has resulted from the lack of coordinating authority.

It is necessary for these federal agencies to resolve their different interpretations of affirmative action programs. We recommend the establishment of a task force or "White House" point to review the differing standards.

The evolution of the OFCCP into a major government enforcement agency has occured with a minimum of review either by Congress or by the program administrators. Over the years, the OFCCP evolved increasingly stringent regulations that tended to transform the affirmative action obligation into a system that could be construed as quota requirements. These regulations have engendered the criticism that the agency now faces.

Though the OFCCP has shown marked improvement in recent years, additional changes are needed to make that agency more objective.

There exists substantial questions as to the OFCCP authority to award back pay as a remedial measure. OFCCP's regulations did not even refer to back pay until 1977, almost 12 years after Executive Order 11246 became effective. Back pay authority must be analyzed for its legality.

Regulatory reform at the OFCCP has been stagnant for quite some time for various reasons. Various proposals have been discussed but

have not been promulgated and this inaction has served to further confuse employers attempting to construct their affirmative action programs.

Specifically, great problems have arisen in the area of availability and underutilization analysis policy. Revised Order Number 4, promulgated in 1971, defined utilization and in 1974 the OFCCP issued a memorandum expanding that definition. Basically, underutilization is to be found where there exists any difference between the availability of minorities or women for a job group and the number of such persons actually employed in the job group.

In 1981, the OFCCP proposed to amend its rules to provide that contractors would be presumed to have reasonably utilized minorities and women in any job group in which their employment was at least 80 percent of availability. The 80 percent proposal was never adopted as official policy but the agency has, as a matter of practice, permitted contractors to use the 80 percent standard or other statistically defensible method of determining underutilization. In addition to the 80 percent rule, the OFCCP has unofficially allowed contractors to use other standards in evidence good faith efforts to comply.

We support the OFCCP's attempts to allow flexibility for contractors in their efforts to comply with agency regulations. Good faith compliance should be the measure of compliance, not strict numerical goals. Furthermore, it is time that a director for the OFCCP is named. The agency has been without a director for about

three years. This has resulted in delays in getting regulations passed. It has left the employer community in limbo without any clear leadership. Leadership must ensue and clear regulations allowing more flexibility in the use of "numbers" must be promulgated.

III. Revision of Executive Order

There have been recently proposals to revised Executive Order 11246 and to specifically remove the use of goals and timetables in federal contractors affirmative action plans.

Monsanto Company believes that Executive Order 11246 provides an effective framework for good national affirmative action policy for federal contractors. The executive order, as enforced by the Office of Federal Contract Compliance Programs, has been critized as leaning towards the establishment of quotas rather than goals. Let it be made perfectly clear, we oppose the imposition of any quota system. If the executive order sanctioned quotas, Monsanto would be first in line in demanding its revision.

There is nothing in the executive order that sanctions quotas and it should not be interpreted that way. However, instead of a new executive order, an examiniation of the implementing regulations of the OFCCP should be made. Specifically, we believe that some of these regulations have become too rigid and should be made more flexible. A good faith effort in compliance of affirmative action goals should be the standard upon whch federal contractors are judged.

We are concerned that the proposed executive order that has been circulated poses a threat to the continuation of voluntary affirmative action programs as practiced by business. We want to continue setting goals in our recruitment, training and promotion programs just as we want to continue to set goals in other areas of our business.

If these changes are made in the implementing regulations, the executive order will satisfy its critics and continue to be an effective program in spurring opportunities for minorities and women. It should continue to require federal contractos to use goals and timetables and emphasize all forms of affirmative action including training, outreach and recruitment.

We are the belief that the Executive Order program has been successful in achieving its purpose of providing opportunities for minorities and women in our workforce. Regarding proposals to substantially change Executive Order 11246, our bottom line is if its not broken, don't fix it.

IV. Results of Affirmative Action Programs

Affirmative action has produced positive results for minorities and women. A study recently published by the Potamac Institute entitled A Decade of New Opportunity: Affirmative Action in the 1970s, shows the significant progress made during the 1970s as a result of private industry's adoption of affirmative action programs.

The analysis used statistics derived from the Equal Employment Opportunity Commission's Employer Information Reports (EEO-1) that are filed annually by employers with 100 or more employees.

The Potomac Institute's study found that substantial gains have been made in the inclusion of minorities and women in the workplace in blue collar, management and professional job categories. For example, black's overall share of the private job market increased 15 percent from 10.1 percent in 1970 to 11.6 percent in 1980. Black officials and managers rose from 1.9 percent to 4.0 percent, a 104 percent increase, professionals 2.5 percent to 4.3 percent, a 72 percent increase, and black skilled workers from 5.6 percent to 8.4 percent, a 50 percent increase.

Women's share of the private job market has been even more dramatic, rising to 41 percent from 34 percent in 1970, an increase of 19 percent. Women in the professionals category increased to 37.7 percent from 24.6 percent, a 53 percent gain, and in the technicians category increased to 40.2 percent from 26.4 percent in 1970, a 52 percent gain. Hispanics also showed similar gains in all areas.

It should be noted that these gains in the employment of minorities and women during the 1970s came in spite of the simultaneous contraction in economic growth and high inflation that occurred in that decade.

The experience of my company, Monsanto, reflects the gains that can be achieved by minorities and women through a corporate affirmative action program.

In the period from 1973 to 1984, exempt professional positions occupied by women grew from 5.2 percent to 15.6 percent; minorities went from 4.5 percent to 10.6 percent. In that same period, middle and upper management representation increased 442 percent from 1.2 percent to 6.5 percent. Non-raw material purchases from minority-owned firms jumped from $15,000 to $43 million. Some of the progress reflected in these statistics would have occurred in the absence of affirmative actions. However, it goes without saying that the rate of progress would have been infinitely slower.

Affirmative action programs in industry have increased minority and female participation in the workforce and this has led to a better working environment, improved communications and benefitted corporate relations with the community. More must be done, however. The job to incorporate all sectors of our society into the workforce is not complete.

V. Affirmative Action and Title VII

Many questions have been raised concerning the continued vitality of affirmative action since June 24, 1984, when the Supreme Court decided Firefighters Local Union No. 1784 v. Stotts (104 S.Ct. 2576). The Stotts case involved a challenge to a court order issued in May

1981 which effectively prohibited the Memphis Fire Department from laying off minority employees in accordance with a seniority system.

The Supreme Court held in Stotts that the lower court exceeded its authority in overriding a bonafide seniority system to preserve employment gains under a previously approved consent decree.

There have been many different interpretations of the Supreme Court's decision. Read most narrowly, the decision holds only that a federal court may not override a bonafide seniority system to prevent the layoff of minority employees unless they have been identified individually as victims of discrimination. This is clearly spelled out in Title VII and does not, NAM believes, invalidate affirmative action programs. The Supreme Court supports this belief.

In the 1979 United Steelworkers v. Weber (443 U.S.193), the Supreme Court upheld a voluntary private affirmative action plan that did not call for the displacement of any employees. We support Stotts, which prohibits quotas in layoffs and can be seen as reverse discrimination. However, affirmative action plans open doors of opportunity by calling for the establishment of goals, timetables and outreach in the recruitment, hiring and promotion of minorities. These is neither quotas or reverse discrimination. The object of such programs is not to displace existing employees in order to provide those opportunities.

VI. Conclusion

The establishment of corporate affirmative action programs have been the result of industry's commitment to the inclusion of minorities and women in the workplace. These programs have indeed succeeded in increasing opportunities for minorities and women. The question which must be asked is if these gains have alleviated the need for affirmative action programs in private industry. Monsanto is of the opinion that that time has not yet come, but will be unnecessary when true diversity in the workplace is reached.

We agree with Secretary of Labor William E. Brock, who stated on June 24 of this year, in support of the continuation of some type of affirmative action:

> "But we as a country have lived for 200 years with a major part of our population in remarkable disadvantage. . . And it takes some time to recover from that."

Many have argued against affirmative action because they say it does not embrace the ideal of a color-blind society. We believe a society that is truly color-blind (and gender-blind) can only be achieved when there is equal opportunity and inclusion in the workplace for every citizen of every nationality, race and sex. When that ideal is achieved there will be no need for continuing affirmative action in the private sector.

In our endorsement of voluntary affirmative action programs, it

should be made clear that we do not endorse quotas in whatever form manifested. Monsanto believes there is a difference between flexible goals and quotas. As to that point, we believe the OFCCP can be improved significantly by reducing unnecessary regulatory burdens and providing employers with more flexibility and clarity. Rigid numerical goals should give way to good faith efforts by business to include women and minorities in the workforce. This will dispell claims of reverse discrimination.

Affirmative action, at its best, is good business. As a result, Monsanto remains committed to the ends of equal employment opportunity for all through affirmative action.

Mr. MARTINEZ. I have a question for you, since you are the director of equal opportunity at Monsanto. The question was asked by Mr. Hayes earlier: Do you know of any instance where someone who could be considered other than a minority has been discriminated against in employment?

Mr. MCEWEN. Sure. I always know of that. Eliminate minorities and women, just forget that we have minorities and women, except for me talking right now. The fact is, we use subjective judgments all the time. We have used subjective judgments way back when we started choosing the sons and daughters of current employees to be the ones who had priority in getting employment opportunities at plants, long before affirmative action ever came in.

We have used subjective judgments which said, if you had a Ph.D. or an MBA from Wharton School of Business, it was probably better than a Ph.D. or MBA from somewhere else, and I won't mention any, because I don't want to get into that. We have used subjective judgments in saying that a person who probably has a background in this will do better in this type of job than that.

We've always used subjective judgments. The thing that, I guess, I disagree with some of the rhetoric that's going around now, is it seems to say that in the absence of an Executive order we know how to be so fair that we can guarantee that, No. 1, we get the most qualified person all the time; and No. 2, that we don't make any subjective judgments. I'm here to say we don't know how to do that, and that's the reason there is a need for a regulatory framework to be there to guarantee that we do our best to minimize our subjective judgments with objective, measurable practice.

Mr. BOOKBINDER. May I add to that?

Mr. MARTINEZ. Yes.

Mr. BOOKBINDER. I think, Mr. Chairman, it would be a mistake if we operated on the basis that no white male has ever been told by anybody that, if you were a different color or different sex, I would be able to hire you. These things do happen.

My point is that, if those things happen and some have happened, the regular procedures and the criteria for bringing a discrimination case is available to a white male just like it is to a black or Hispanic or anybody else. It's there. The danger is to extrapolate from these instances a general condemnation of a program which clearly does a lot of good and ought not to be destroyed.

Mr. MARTINEZ. Mr. White.

Mr. WHITE. Mr. Chairman, may I have a minute also?

Mr. MARTINEZ. Yes.

Mr. WHITE. I think that the whole question of a regulatory framework is to prevent arbitrariness, and the best example I can think of is when Sandra Day O'Connor was appointed to the Supreme Court. If you recall, this was in the newspaper anyway, that they asked a high White House official whether or not the fact that Sandra Day O'Connor was a woman had anything to do with the appointment, and they said it did not go unnoticed.

Now what I'm trying to say is: It is all right for them, it is all right for us. What I mean by that is that you'd have to try to take the arbitrariness out of the process, and that is that we can do it when we want to do it. And that's exactly what they were saying.

What we're saying is that we have to get equality in the system. We have to try to address the past, the past discrimination that has existed.

Mr. MARTINEZ. I agree with you.

Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Mr. McEwen, let's focus on this whole issue of compliance reviews, because it seems the Department struggles a little bit to determine—to respond as to how they determine whether or not the business is in compliance.

Can you elaborate how Monsanto becomes in compliance when that review occurs, for all of us, for the record? I think you did a pretty good job of this in your opening statement, but I think we ought to expand. Exactly how do you meet compliance standards?

Mr. MCEWEN. OK. In order to explain that, let's talk about what an affirmative action plan is. That document is simply a document that analyzes a work force and is broken down into nine major EEO categories from officials and managers down to laborers.

It looks at that work force on a racial and sexual breakdown. Then it takes the work force and compares the work force with statistics which indicate availability of those types of people in the labor force. Then it tries to compare the representation on that work force with the statistical representation in the labor force.

Then it looks at the opportunity. If you have fewer on your work force than in the labor force, it looks at goals and timetables you've set for rectifying that, and it looks at what efforts you've made where there have been opportunities to get the representation of the protected group closer to the representation or availability of that group in the surrounding or the applicable work force.

Now again part of the problem has been that, as we've gone more and more from when these regulations were first implemented to today, statistical evidence has—instead of being one of many factors that are looked at, it has become the factor. It's not unlike what we did in testing.

You know, we outlawed testing for a while because they weren't validated. Well, tests in themselves are not bad, but what had happened was tests were used as the initial indicator, and anyone who didn't pass that test didn't get beyond that. Everyone else got the other indicators applied to them; you know, their prior experience, their health, and so on.

Just as we had to take the tests and go back and say, it's one of several indicators, what we have to do here is the statistical element is one of several indicators.

Now I was formerly a compliance officer, so I must tell you that, years and years ago, in my other life. But one of the things that I must also say is part of the brunt for where we are now rests with Congress also, because when the OFCCP comes before whomever they have to come before for appropriations—you know, you're talking about measuring—how is the effectiveness of the OFCCP measured? Not by the numbers of new jobs that they've created, not by the numbers of minorities or women who have been placed; by the amount of backpay that they've gotten, by the amount of show cause that they've done, by the number of compliance reviews. Those are activities.

In the end analysis, they may or may not be the right indicators to determine the effectiveness of the group. Without getting into a debate with Ms. Meisinger, I came out of my separate but unequal high school a long time ago, but even the old math didn't tell me how you can do that much more with that much less.

Mr. GUNDERSON. That was going to be my second question.

Mr. MCEWEN. I anticipated that.

Mr. GUNDERSON. I was the one that had made that allegation. Is it your opinion that the present efforts at OFCCP are inadequate? While I'll be happy to join everyone on this issue of how do we enforce affirmative action if we have a new Executive order, the purpose of this hearing really is oversight. I'm sincerely interested in the Office's functioning capacity today.

Mr. MCEWEN. The OFCCP effort is better. It's getting better. It needs fine tuning. There are still areas in OFCCP effort, especially on the implementing regulations and the fact that we in business have been sitting for the last 3 years waiting for a group of revised regs that were supposed to be ready 3 years ago; and it's just like it's in the mill.

For years, it's coming, they'll be here, you know. The fact is the people in OFCCP, the EOS', are at a very big disadvantage, because, first of all, they're having to come into our businesses utilizing the regulations that are on the books now. They also have been privy to all the debate that's going on about how those regulations are to be changed or had been changed, and they've heard the testimony of how nonsensical some of it is.

So their heart is not in pursuing an eight-factor analysis when they know that an eight-factor analysis doesn't make a heck of a lot of sense anymore, and that you can do it with four factors or less.

Their heart is not in a whole lot of the other provisions that they know are sitting out there in proposed regulations that have not been approved yet and still they're having to do these reviews, and they are doing the reviews. But I guarantee you one thing. There are areas where they're more concerned about having I's dotted and T's crossed so that they can pass these quality reviews that you heard about than they are in meaningful problems that exist in the affirmative action program. And when process gets in front of realism, that's a problem.

Mr. GUNDERSON. Thank you.

Mr. MARTINEZ. Thank you, Mr. Gunderson. Mr. Hayes.

Mr. HAYES. Mr. McEwen, this is sort of a followup to my colleague's question—Mr. Gunderson. In your testimony you stated that the Office of Federal Contract Compliance Programs had unofficially allowed contractors to use other standards and evidence of good faith efforts by—I think that's on page 6 of your testimony. What other standards has Office of Compliance permitted business to use?

Mr. MCEWEN. Well, without talking out of school, I wish I knew how to plead the fifth amendment without pleading the fifth amendment. But let's just say that OFCCP can be very creative. Part of what occurs now, especially with the two sets of guidelines out there, is the effectiveness of some of the compliance reviews de-

pends upon the skill of the EOS versus the skill of the persons at the site that's undergoing compliance.

The OFCCP has been criticized, and rather severely, especially at the beginning of the 1983-84 session, for being confrontational; and in an effort to be less confrontational, they have been less vigorous and more creative in some areas, without indicting anybody. Just suffice it to say that there has been a lot of leeway given, or there can be leeway given, depending upon the skill of the EOS and the skill of the company representative in the standards that are used sometimes to measure compliance.

Mr. HAYES. Would you agree that these standards have not been officially implemented through the rulemaking process?

Mr. MCEWEN. Some of them haven't.

Mr. HAYES. Now Mr. Bookbinder, I was glad to hear you really say what you said about Attorney General Meese's speech, his authoritative position on slavery yesterday, I think it was. Noticed it in the New York Times. But then you throw me a little bit when you—I have to ask you. What's the basis of your confidence? Meese is not divorced from this administration. What is the basis for your confidence and your belief that this administration's dedicated to a program of affirmative action?

Mr. BOOKBINDER. You're not going to challenge my respect and graciousness in making that comment, are you?

Mr. HAYES. Just help me. Help me to understand the basis for it.

Mr. BOOKBINDER. I just—I really—more seriously, I do not think it's particularly helpful. It doesn't move us forward to attribute bad motives for what I consider to be very, very wrong actions. It's the wrong actions I want to address myself to, not the attributions of venom or venality or that kind of thing. I think that when Mr. Meese suggests that those of us who support effective affirmative action, including nonpreferential goals that we are thus doing something comparable to justifying slavery, I think he has stopped being gracious and respectful of another point of view. That was my only point.

I think this administration is making serious mistakes in the whole civil rights area, and I hope that the attention that this hearing today might bring to the administration will be helpful in avoiding a major, major, colossal mistake.

Mr. Hayes, I want to express my appreciation to you, because this hearing wasn't 10 minutes old when you really hit the nub of the question, and you asked the early witnesses whether they did not realize that, in the regulations that carry out the Executive order, today's regulations say that goals may not be rigid or inflexible quotas.

It is said that the purpose of all of this proposed order is to wipe out quotas. There's no need for that. Quotas are today outlawed by the law and the regulations of the agency. And thank you for making it so clear by your first question.

Mr. HAYES. I'm very clear, too, Mr. Bookbinder. When I'm faced with a situation, whether the Office of the Attorney General is suing the city of Chicago because of its position in the upgrading and employing of firemen, policemen, in order to eliminate what has been a deficit in terms of numbers, I question as to whether or not they know what they're doing. I can't ever say that there's any

degree of sincerity in their commitment to affirmative action, as long as they take this kind of position.

Mr. BOOKBINDER. I think what we're seeing, and I note that in my fuller statement that I know will be in the record. I say what's happening here, tragically, is that the idealogues in and outside the administration want to score a great big philosophic victory by this proposed order, and that will be very, very counterproductive. I hope they don't really insist upon winning this kind of theoretical ideological argument.

Mr. HAYES. Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Hayes. Mr. Henry.

Mr. HENRY. Pass.

Mr. MARTINEZ. In closing, I'd like to ask a question of you, Mr. Bookbinder. It's generally been the perception of many of us that the Jewish groups generally oppose the concept of affirmative action. Came out very strongly, I know, against goals. Why is your organization now opposing the repeal or modification of that Executive order?

Mr. BOOKBINDER. If it's not illegal, Mr. Chairman, I'm going to send you a special box of chocolates for asking me that question. I'm delighted to respond. I'll do it briefly, and my statement in part does go to that.

There is indeed a terrible, horrible perception out in the community, especially in the black community, that the Jewish community of America opposes affirmative action, and specifically, opposes goals and quotas. This morning on CBS News at a quarter past seven, for example a marvelous man, Dr. Poussant, whose general performance this morning related to Louis Farrikhan was excellent, made a terrible mistake and said that blacks are upset with the Jews, because Jews oppose goals and quotas. There is only one important national Jewish organization that opposes goals and quotas. We all oppose quotas, but for years I've been pleading that people believe me and us when I say that the overwhelming majority of Jewish organizations and Jewish representatives have not only been willing to accept goals, but we insist. It's been our position since 1972 that goals are a perfectly appropriate system. Affirmative action is needed.

I started out by saying that there's been progress in equal opportunity, but not nearly enough, and we must not dismantle our machinery. We're for all of those noncontroversial things, of course, like training and education, proper recruiting. Nobody argues about that. We don't do enough of it, but nobody argues about that.

We also believe, as the questions have already indicated this morning, you have to have some basis for judging whether affirmative action is working. It shouldn't, and I agree with my panelist here, it shouldn't be an automatic criterion for whether efforts are coming through. That's why the good faith test is very important.

So, Mr. Chairman, I hope that—I know that I won't have to say it to you again, but I know I'll have to say it to the country over and over again. The Jewish community of America is a strong supporter of affirmative action.

Mr. MARTINEZ. Thank you, Mr. Bookbinder.

Now Mr. White, there's been talk that under this new, modified Executive order that reverse discrimination suits would be ramp-

ant. How would that affect New York or any State government's employment policy?

Some people that are opposed to this modification—what is anticipated to be the modification—that it would open Pandora's box to all kinds of suits by white males, of discrimination.

Mr. WHITE. Well, first, certainly I think they would have to be identifiable. But I think what it opens the door for is it will be devastating to—let's take New York, Department of Transportation in New York, or the MTA which hires thousands and thousands of employees. What you're going to find is probably a lowering of the amount of minorities who are working in those particular agencies.

I think that's the major concern. I don't think the concern is lawsuits on the parts of white males against—that's not my concern. I might note that I was formerly director of the Bureau of Labor Services in New York City, and we dealt with over a billion dollars in contracts and services applying contracts. You know, I just know that, as of now, the OFCCP is an ineffective organization. I just want to make that clear. It's ineffective now.

If you're talking about gutting the teeth out of the regulation, it's going to be less effective. One of the things you have to understand, too, is that the mechanism, the standards of 11246 are often used for other purposes.

For instance, in New York State we have the ability to go after particular employers if we feel they're discriminating based upon some very preliminary information and evidence. One of the things we use is 11246 in looking at the company. We look at the available labor pool, and that's how we make certain determinations, in addition, whether or not they're making a good faith effort to meet certain goals. That's what we're talking—a good faith effort—we're not talking—They don't have to flatly do it.

So that is a concern that we're having in New York.

Mr. MARTINEZ. OK. Let me be a little more clear on the question I'm asking you. The reason why there is an indication that there would be these suits is because right now it's considered that most white males don't sue because it's in the law that you do have this process that's in place for timetables and goals. But once that is repealed, and there's nothing in the law, the State governments and private companies that are doing Federal contracting and whom are complying with this law will have no protection. Even if they wanted to do it on a voluntary basis, there's nothing in law that says that they must do it. The suits would then be directed against them if they tried to practice it on a voluntary basis.

Mr. WHITE. Well, I do think there would be some increase in the private sector for that reason. But I think that—I mean, that's just not my major concern, is what I'm saying. You know, give an example. In New York City, for instance, in the labor unions you will not find a dramatic increase in the amount of women and minorities who are working in the labor union in different trades.

Some trades are excellent, and some are not. Primarily, in the electrical trades you have problems. The fact of the matter is it's still a father-son profession. That's something that you have to understand.

Now you're not going to get any complaints there. OK. For whatever the reasons in the political dynamics that are operating, you

do not—You're not going to get white males that will be bringing lawsuits. We have many more suits in New York, the reverse side, and we've been litigating for 20 years over the same points; and we're not getting any relief. We're certainly not getting any relief from the OFCCP.

Mr. MARTINEZ. Thank you.

We thank you all for appearing before us. Your testimony was invaluable to us. Thank you very much.

Is Mayor Holland in the audience? He's on his way? All right then, we'll proceed with the second panel and, as soon as he arrives, we'll take him right after that panel.

The second panel consists of Althea Simmons and Marcia Greenberger and Arthur Flemming and Bill Taylor. We'll begin this panel with Althea Simmons.

STATEMENT OF ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. SIMMONS. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I'm Althea T.L. Simmons, director of the Washington Bureau of the NAACP, a 76-year-old national civil rights organization with some 2,100 units in 50 States and the District of Columbia.

The NAACP is solidly in support of affirmative action. We know the value of using numerical goals and timetables, and we reaffirm our strong belief that Executive Order 11246 is needed.

Opponents of affirmative action would have you believe that preference is something dirty. That is not true. There are bases in law and reasons for doing so. American Indians have been accorded preference in a number of Federal Government programs under various constitutional enactments. The Supreme Court has upheld these statutes and has ruled they are not racially discriminatory.

The court has based its opinion on the special relationship that Indians have held with the Federal Government under the Constitution. Blacks likewise have maintained a special relationship under the Constitution, one that is altered by the 13th, 14th, and 15th amendments but the effects of which create and continue to create the need for affirmative action for them.

That is painfully true today. Neither of these groups have been made whole. Both groups share special constitutional status and a common history of denial of fundamental rights.

I cite that, Mr. Chairman and the subcommittee, as the basis for our speaking to the issue of affirmative action and, specifically, Executive Order 11246.

As early as 1961 it was recognized that there was a need for something other than just a mere cessation of overt discriminatory practices, because discrimination had served as barriers to entry into the work force. Therefore, emphasis was placed on specific affirmative steps, affirmative action, if you will, to increase the participation of minority workers.

Those requirements were embodied in revised Order No. 4 and also we note that the hue and cry of persons with reference to affirmative action is one of the best examples for its continuance. Af-

firmative action works. It works even though it's been under assault since its inception.

Now the past 4 years have brought a renewed attack against affirmative action, and even though we are told this is a change of focus, that they believe in affirmative action and that this is not a retreat from the goal of equality, I would say that if you take a look at statements made by members of the administration, it is perfectly clear that it is a retreat.

Attorney General Smith said:

> . . . The nation must end its overreliance on remedial devices aimed solely at achieving inflexible and predetermined mathematical balance.

Mr. Reynolds has said:

> By elevating the rights of groups over the rights of individuals, racial and sex preferences are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. This kind of affirmative action needlessly creates a caste system in which an individual must be unfairly disadvantaged for each person who is preferred.

He has said the "caste system," is reverse discrimination.

Let me say to you that black workers—the argument of the administration is, on so-called individual rights and ignores basic social reality. Black workers have not been denied jobs as individuals, but as a class, irrespective of personal qualifications and/or merits. Women have been denied training and/or jobs not as individuals but as a class regardless of their individual talents or lack thereof. Also, white males as a class have benefited from this kind of systemic discrimination.

When you hear the term reverse discrimination, the argument implies that the quality of work status and/or performance would be lowered as a result of the employment of minorities and women. In truth and in fact, the so-called merit system gives preference to competent, mediocre and/or incompetent whites at the expense of competent as well as mediocre, and incompetent women and minorities.

Under the guise of a specious merit system which, in fact, does not exist, affirmative action opponents are attempting to etch in concrete traditional discriminatory practices that result in the exclusion of blacks, women, and others from high paying jobs.

That concept is a good concept. As a matter of fact, it came out of a case that NAACP brought, *Ethridge* v. *Rhodes,* that was decided in 1967; and it was then embodied in the Philadelphia plan. But, Mr. Chairman, we believe that we have to attack the things that the administration is saying, and I also want to lift up the fact that Mr. Meese made in his speech on yesterday, appeared in today's Washington Post.

When you read that article, you find out that the administration is raising still the same specters that tends to confuse the public with reference to the real issues in affirmative action, the use of numerical goals and timetables.

There is no doubt that we cannot talk in terms of a color blind society. Our society is not color blind. As a matter of fact, in the *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler,* in validating a statewide affirmative action plan requiring the

building contractors to employ a certain percentage of minority workers, the court said (and I quote):

> It is by now well understood, however, that our society cannot be completely color blind in the short term if we are to have a color blind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because of the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

Mr. MARTINEZ. One minute.

Ms. SIMMONS. Let me say in closing, Mr. Chairman, that I hope that you will not let the administration's reverse discrimination rhetoric obfuscate the true role of numerical goals and timetables, because they recognize that past patterns of discrimination have created an imbalance. They do not demand that persons truly unqualified be hired. It presumes that when truly color blind hiring practices are employed that the ratio of minorities will roughly approximate their ratio to the total work population.

I would suggest that in the event that this Executive order we've been talking about does come into being that will do away with 11246, that this Congress will take some measures to put in place some legislation that will ensure that those of us who have had an opportunity to put our fingers through a door that has been cracked in equal opportunity will be able to swing wide that door and actually benefit from the fruits of our labors.

Thank you so much.

Mr. MARTINEZ. Thank you, Ms. Simmons.

[The prepared statement of Althea T.L. Simmons follows:]

PREPARED STATEMENT OF ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman and members of the Subcommittee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. The NAACP is a 76 year old national civil rights organization which has 2100 units in all 50 states and the District of Columbia.

The NAACP is solidly in support of Affirmative Action. We know the value of using numerical goals and timetables and reaffirm our strong belief that Executive Order 11246 is needed.

Mr. Chairman opponents of affirmative action would have you believe that preference is something dirty. This is not true. There are bases in law and reasons for so doing. American Indians have been accorded preference in a number of federal government programs under various constitutional enactments. The Supreme Court has upheld these statutes and has ruled that they are not racially discriminatory. The court has based its opinions on the special relationship that Indians have held with the Federal government under the Constitution. Blacks likewise have maintained a special relationship under the Constitution; one that was altered by the 13th, 14th and 15th Amendments, but the effects of which continue and create the need for affirmative action for them. This is painfully true if we look at the issue from a family point of view. The need is greater in the black community for economic and educational assistance. We have pointed up the similarity of blacks with First Americans inasmuch as both groups are the only groups the Constitution counted as three-fifths persons. Both groups still need

to be made whole under the Constitution and in fact; both groups share a special Constitutional status and a common history of denial of fundamental rights.

Mr. Chairman and members of the committee, I cite the above as background for our speaking to the issue of affirmative action and specifically Executive Order 11246.

President Roosevelt, on the eve of World War II issued an Executive Order which was substantially strengthened in 1961 by President Kennedy.

At that time there was recognition that a mere cessation of overt discriminatory practices would not suffice since discrimination had served as barriers to entry into the workforce. Therefore emphasis was placed on specific affirmative steps - affirmative action - if you will, to increase the participation of minority workers. The requirements were embodied in Revised Order No. 4 which applied to nonconstruction contractors and a parallel set of requirements were developed for the construction industry.

The present hue and cry over affirmative action is one of the best examples we could give for its continuance. It works. It works even though it has been under assault since its inception.

The past 4 years have brought a renewed attack on affirmative action despite its characterization as a "change of focus" which we are told must not be interpreted as a retreat from the goal of equality. Former Attorney General William French Smith, speaking for the Administration in 1982 stated:

> "We need to engage in practical problem-solving and adopt measures that will realistically remedy the direct results of discrimination. That means the nation must end its over-reliance on remedial devices aimed solely at achieving inflexible and predetermined mathematical balance."

Assistant Attorney General William Bradford Reynolds, in giving a rationale for the current Administration's policy, stated:

> "By elevating the rights of groups, over the rights of individuals, racial and sex preferences are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. This kind of 'Affirmative Action' needlessly creates a caste system in which an individual must be unfairly disadvantaged for each person who is preferred."

The "caste system," according to the Assistant Attorney General, is "reverse discrimination."

Mr. Chairman, and members of the committee, the proposed or draft Executive Order is but a culminating step in actions already undertaken by the administration to erode affirmative action. In August, 1982 the U.S. Department of Labor proposed a sweeping revision of affirmative action regulations which did not meet court approved, Congressionally-mandated standards under either Executive Order 11246 or the spirit and intent of Title VII of the Civil Rights Act of 1964, as amended.

Earlier this year the Justice Department wrote some 51 jurisdictions which use race and gender conscious goals and timetables asking them to seek modification of consent decrees.

Mr. Chairman and members of the Subcommittee, the NAACP rejects the argument that the use of numerical goals will penalize innocent whites who are not responsible for past discriminatory practices. This argument is based on the notion of so-called individual rights and ignores basic social reality. Black workers, for example, have not been denied jobs as individuals but as a class - irrespective of their personal qualifications and/or merits; women have been denied training and/or jobs not as individuals, but as a class regardless of their individual

talent or lack thereof. Also, white males, as a class, have benefited from this systemic discrimination.

The Federal Courts in Parham v. Southwestern Bell Telephone Co., Oates v. Crown Zellerbach Corporation, Bowe v. Colgate-Palmolive Co. and other cases have recognized that employment discrimination is by nature class discrimination.

The "reverse discrimination" argument implies that the quality of work standards and/or performance would be lowered as a result of the employment of minorities and/or women. In truth and in fact the so-called "merit" system gives preference to competent, mediocre and/or incompetent whites at the expense of competent as well as mediocre and incompetent women and minorities. Under the guise of defending a specious "merit system" which in fact does not exist, affirmative action opponents are attempting to etch in concrete traditional discriminatory practices that results in the exclusion of blacks, women and others from desirable high-paying, skilled jobs.

In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court held that:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been diliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

The Court ruled that mathematical racial ratios could be used as "a starting point in the process of shaping a remedy."

Although the courts have repeatedly spoken on this issue the extensive public discussion of affirmative action programs has ignored the major legal interpretations of the validity of numerical goals and timetables in civil-rights enforcement efforts. In the last half of the 1960s, as a result of an emerging body of law relating to employment discrimination, new forms of implementation were developed to obtain compliance with legal requirements. Among the most important of these was the concept of numerical goals to be achieved within stated time frames. The use of numbers expressed in the form of goals and timetables to enforce the legal prohibitions against job discriminaiton had its origin in a Fourteenth Amendment case, Ethridge v. Rhodes, initiated by the National Association for the Advancement of Colored People, and decided on May 17, 1967 by the U.S. District Court in Columbus, Ohio.

In that case, the NAACP proposed the principle that state agencies require a contractual commitment from building contractors to employ a specific minimum number of black and other minority workers in each craft at every stage of construction. This concept, later incorporated in the Philadelphia Plan, was potentially the most effective means of achieving compliance with the law. The Philadelphia Plan, challenged in the federal courts, was a significant development in contact compliance efforts. It was to become the case that joined the issue and was most important in establishing the legality of the use of numerical goals in federal civil rights enforcement.

In response to the arguments of contractors and labor unions that the Philadelphia Plan contained illegal racial quotas the U.S. Court of Appeals for the Third Circuit stated, "Clearly the Philadelphia Plan is color-conscious....In other contexts color-consciousness has been deemed to be an appropriate remedial posture."

The Court further held that:

> The Philadelphia Plan is valid executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool in which the Federal Government has a cost and performance interest. The Fifth Amendment does not prohibt such action.

In this important decision, the appellate court decisively rejected the argument that government imposed goals and timetables for the employment of blacks and other minorities was unconstitutional. On the contrary, the court specifically validated the legality of this approach where necessary and the Supreme Court let stand by refusing to review.

In a later case involving a state government -- Builders Association v. Ogilvie - the Seventh Circuit Court of Appeals in 1972 affirmed the use of job quotas and held that:

> Numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality.

As the courts perceive it, pledges of passive nondiscrimination alter nothing and there is no meaningful measure of change other than numbers.

In this context, federal courts repeatedly recognized that race-conscious injuries require race-conscious remedies. In Norwalk CORE v. Redevelopment Agency, a Federal court stated:

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent that it is necessary to avoid unequal treatment by race, it will be required.

In United States v. Local 28, IBEW, it was held that the "anti-preferential treatment" section of Title VII does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. According to the Court of Appeals for the Sixth Circuit, "any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." In Associated General Contractors of Massachusetts, Inc. v. Altshuler in validating a statewide affirmative action plan requiring building contractors to employ a specified minimum percentage of minority workers:

> It is by now well understood, however, that our society cannot be completely color-blind in the short term if we are to have a color-blind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inqualities.

It is evident that a substantial body of case law has established not only the permissibility, but indeed the necessity, of numerical goals and affirmative action programs to eliminate discriminatory employment patterns. But the opponents of affirmative actions persist in their campaign of distortion, deliberately confusing goals with the pejoratively

labeled "quotas" and denouncing affirmative action as "reverse discrimination."

A well orchestrated nationwide propaganda operation, based upon systematic misrepresentation and the manipulation of racial fears among whites has succeeded in causing the federal government to retreat on this crucial issue. Administrative enforcement of affirmative action requirements contained in the comprehensive body of civil rights laws and Executive Orders has, for all practical purposes, ceased and the process of administrative nullification is apparent in the proposed Executive Order. Under Executive Order 11246 contractors who do business with the government are required to analyze their employment practices and develop goals and timetables, to increase the rate at which minorities and women are hired where the facts show the need for such relief. The current order covers the same type of discrimination which is covered by Title VII of the 1964 Civil Rights Act. Executive Order 11246 has been the instrument through which the door of equal opportunity has been cracked. The administration's actions have prevented further opening of the door. The draft or Proposed Executive Order to replace 11246 would close the crack in the door of equal opportunity. It would prevent the government from looking at any statistical proof, regardless of how great a weight a court would give to such proof.

Mr. Chairman and members of the Subcommittee, our nation can no longer afford the luxury of playing games with civil rights. We cannot limit affirmative action remedies to direct proof of intentional

discrimination. Very few contractors, will say they "intend" to discriminate, but many contractors now required to have written affirmative action plans will dismantle any or all affirmative action efforts sans a law or Executive Order.

Many of our 2100 branches across the country have been alarmed by the possibility of the Proposed Executive Order and have urged us to convey such concerns to members of the Administration and the Congress. In the event the Preisdent strips 11246 of its intent through an Executive Order which limits or does away with the use of numerical goals/timetables, we shall certainly urge the Congress to pass legislation that will provide for remedies which will level the barriers that exist to equal opportunity.

Mr. Chairman and members of the Subcommittee we have chosen to make a case for affirmative action, to reaffirm that affirmative action does work and to urge the Congres to not abrogate its responsibility in this regard.

In closing, I would urge that you not let the Administration's "reverse discrimination" rhetoric obfuscate the true role of numerical goals and timetables. First they recognize that past patterns of discrimination have created an imbalance; Second, they do not demand that persons truly unqualified be hired. Third, it presumes that when truly "colorblind" hiring practices are employed, the ratio of minorities hired will roughly approximate their ratio to the total work population. If the facts belie this presumption on employers not required to adhere to such timetables. Since the employer is the only one who actually knows why hiring decisions were made, it is only fair that the employer be the one with the responsibility to show any valid reasons why it could not meet the goals and timetables.

Thank you for this opportunity to express the NAACP's views on this subject which is so vital to the black community and the nation.

Mr. MARTINEZ. Ms. Greenberger. And let me remind the panel again that the entire testimony is being entered into the record, and to please summarize your testimony.

STATEMENT OF MARCIA GREENBERGER, MANAGING ATTORNEY, NATIONAL WOMEN'S LAW CENTER

Ms. GREENBERGER. Thank you, Congressman. I will try to be brief and summarize my testimony. With me is Patty Goldman. We did want to direct our comments in particular to the proposed changes in the Executive order that have been so much a part of the news over the last few weeks.

We are certainly familiar with problems of enforcement and have listed in our testimony some of the cases in which we serve as counsel where there have been documented problems of enforcement persisting through these recent years with respect to OFCCP.

In light of the testimony of OFCCP representatives and Ms. Meisinger in particular lauding the enforcement efforts of OFCCP, I did want to refer just briefly to the fact that a court reentered an order in 1983 again finding OFCCP inadequately enforcing Executive Order No. 11246 with respect to universities. So these problems do continue.

Rather than talk about the enforcement issues which I know other witnesses will address, we did want in particular to talk about the proposals to change the Executive order, in part also because those very proposals are affecting enforcement at this minute.

We have been advised of individuals who have been told that their cases will no longer be pursued and that enforcement will no longer be sought for them, because statistics and evidence upon which their cases were based will no longer form a basis for enforcement. And this is happening today.

So I think that these proposals very much affect current enforcement as well, obviously, as future enforcement.

The proposals are, as the witnesses before me have elaborated so clearly and so well, dramatic departures from the consensus that has in essence been reflected in court decisions, in title VII, in State and local laws over the years. They are a consensus that reflects what lessons we have learned as a country in terms of what is needed to eradicate discrimination in employment.

The Executive order has been improved over the years. The regulations that embody the affirmative action and goals and timetables requirements reflect those lessons and reflect the fact that, without those kinds of specific guidelines, improvements will simply not be made.

There has been quoted specifically what the regulations actually require. They are quoted in our testimony as well on page 4, and it's important to reemphasize the fact that good faith efforts are required. They are not rigid. The goals are end points to be worked toward. They are not—contractors are not debarred. Contractors do not suffer sanctions simply because they do not meet the goals.

The proposals, in an effort to remove the goals, would in effect prohibit the Government from seeking any goals and timetables in the future; and in fact, in the one version of the Executive order

which has been made—the proposals which has been made public, there is at least an implication in the way that it's worded that contractors would be prohibited from voluntarily engaging in goals and timetables as well.

The adverse effects of that kind of change are easy to see when one sees how goals and timetables and measurements have become an integral part of the way the work force operates today.

The proposals would not just eliminate goals and timetables. As has been discussed, the proposals would also remove a review of statistics from an analysis of whether an employer is actually discriminating or not.

Mr. MARTINEZ. One minute.

Ms. GREENBERGER. The statistics are in essence the bottom line that have been recognized as essential measures of what a contractor's employment posture and policies are. Without those statistics, the Government would be closing its eyes to one of the most important measures of whether there is discrimination.

In our testimony, we review in some detail the fact that in essence this proposal as we have seen in, and in fact both versions as they have been reported, would abdicate the Government's constitutional obligation not to support discrimination. What the Government would be doing, just as it argued it should be allowed to do in the *Bob Jones* case, would be funding discriminators, refusing to look at the very evidence that supports the fact that discrimination is taking place, and allowing our taxpayers' dollars to be used by contractors and employers who discriminate in their workforces. That is simply unacceptable.

Thank you.

[The prepared statement of Marcia Greenberger follows:]

PREPARED STATEMENT OF MARCIA D. GREENBERGER AND PATTI GOLDMAN, NATIONAL WOMEN'S LAW CENTER

Summary

The Reagan Administration is now embarking on an ill-conceived crusade to decimate the Executive Order that prohibits employment discrimination by government contractors. Recent Administration proposals to rewrite Executive Order 11,246 would eliminate goals and timetables, a flexible form of affirmative action, and the use of statistics. In a stroke of a pen, the President could undo the steady progress made by Republican and Democratic Administrations alike toward developing an effective Executive Order program. As past experience has shown, without the use of statistics and goals and timetables, the goal of equal employment opportunity for women and minorities in the work forces of government contractors has not been achieved.

The Administration's attempts to eliminate sex- and race-conscious measures and remedies from the Executive Order program are at odds with widely accepted notions of what constitutes unlawful discrimination and appropriate remedies for such discrimination. Courts and legislatures employ such measures and challenges to their actions consistently fail.

The consequences of the proposed revisions in the Executive Order are stark. These changes would put the government in the position of subsidizing unlawful discrimination. This would violate fundamental notions of fairness but even more important the government' constitutional duty not to fund discrimination.

Through this and other efforts to abolish goals and timetables and the use of statistics in discrimination cases, this Administration is demonstrating its lack of concern for the women and minorities of this country who suffer the devastating effects of race and sex discrimination.

INTRODUCTION

Mr. Chairmen, and members of the Subcommittee on Employment Opportunities, I am Marcia Greenberger, a managing attorney of the National Women's Law Center. With me is Patti Goldman, a fellow with the Women's Law and Public Policy Fellowship Program working with the Center this year. We appreciate your invitation to testify here today and the opportunity to explore the devastating ramifications the proposed revisions of the Executive Order would have for equal employment opportunities of women and minorities. Because we have worked primarily in the area of sex discrimination, our testimony will be directed toward the impact on women of the proposals to rewrite the Executive Order. We do want to note, however, that women face discrimination not only because of their gender, but also because of their race, national origin, disability, and age. Given the overlapping nature of discrimination and the like effect of the proposed changes on minorities and women, our comments pertain to the Executive Order program generally as well as to the program as it affects women in particular.

Since 1972, the Center has worked on issues of sex equity in employment, with a particular emphasis on the Executive Order program. We have monitored OFCCP enforcement practices throughout this period; on behalf of numerous organizations have submitted comments on proposed changes in the regulations that

implement the Executive Order; and have served as co-counsel in several cases that challenge the government's enforcement practices under Executive Order 11,246 or pertain to Executive Order provisions; namely, Advocates for Women v. Marshall, No. 76-0862 (D.D.C.); Women Working in Construction v. Marshall, No. 76-527 (D.D.C.); Women's Equity Action League v. Bennett, No. 74-1720 (D.D.C.); and United States Department of Labor v. Harris Trust & Savings Bank, Admin. Proceeding 78-OFCCP-2 (representing intervenor Women Employed).

We will direct our comments to the Administration's proposals to rewrite Executive Order 11,246 and the impact such revisions would have on the government contract compliance program and discriminatory practices in employment. We know that the Women's Legal Defense Fund will be discussing enforcement issues and we refer to their testimony on those points.

I. THE PROPOSED REVISIONS OF THE EXECUTIVE ORDER

There are currently two purported proposed Executive Orders which have surfaced from within the Administration. From reports in the press, it appears that both proposed revisions would eliminate required affirmative action and the use of statistics under the government contract compliance program. They appear to differ only in the extent to which they seek to eliminate voluntary affirmative action efforts.

The proposals to rewrite Executive Order 11,246 are truly anomalous. In a stroke of the pen, the President could undo the

steady progress made in the decades-long process of developing and crafting an effective Executive Order program. This is the first time in a forty-four year history that an administration is attempting to weaken the Executive Order program.

The current Executive Order establishes and implements the proposition that government funds should not support unjust and unconstitutional discrimination against women and minorities. The Executive Order achieves its objectives by requiring that a clause be included in government contracts in which government contractors assure that they will not discriminate against any employee on the basis of race, color, religion, sex, or national origin. The Executive Order further requires that businesses and institutions that choose to contract with the federal government take positive measures to ensure equal opportunity for minorities and women. This requirement, what is commonly known as affirmative action, is defined in the regulations as "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort." 41 C.F.R. §60-2.10 (1985). It is not a system of quotas, but rather it is one of flexible objectives set by the contractors which they must then make a good faith effort to meet.

Each contractor is required to analyze its work force and determine whether women and minorities are under-utilized given their availability. If this analysis reveals that women or minorities are under-represented, then the contractor must develop and submit numerical goals for the full and prompt utilization of the protected groups and timetables for the

achievement of those goals. According to the regulations, "[g]oals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." 41 C.F.R. §60-2.12(e) (1985). The goals and timetables are the administrative tools for assessing the effectiveness of qualitative efforts to ensure equal employment opportunity. In contrast to a quota system, federal contractors are not automatically subject to sanctions for failure to meet goals; the requirement is that a good faith effort must be made.

In the wake of more than four decades of commitment to a strong Executive Order progam by Republican and Democratic Administrations alike, this Administration is now considering rewriting the Executive Order in ways that would decimate the mandate and effectiveness of the Executive Order program. There are currently two reported proposed revisions of Executive Order 11,246; one drafted by the Office of Management and Budget (OMB) and supported by the Attorney General, and another compromise proposal supposedly drafted by William Bradford Reynolds. Both would eliminate two important aspects of the current contract compliance program.

First, they would prohibit the government from seeking to have contractors adopt affirmative action plans that include numerical goals and timetables. According to the terms of the OMB proposal:

> Nothing in this Executive Order shall be interpreted to require or to provide a legal basis for a Government contractor or subcontractor to utilize any numerical quota, goal, or ratio, or otherwise to discriminate against, or grant any preference to, any individual or group on the basis of race, color, religion, sex, or national origin with respect to any aspect of employment. . . .

Section 217 of OMB Proposed Executive Order. The proposed revisions would prevent the Department of Labor from requiring contractors to engage in any form of race- or sex-conscious action with respect to any aspect of employment ranging from hiring and promotion to recruitment and training. The proposals would therefore limit the effectiveness and reach of remedies for employment discrimination that would remain covered by the proposed revisions, by eliminating nearly all and certainly the most effective types of affirmative action. In addition, it appears to be the design of the Administration that under either of the proposed changes government contractors would no longer be able to use the Executive Order as a justification for imposing goals and timetables in reverse discrimination challenges. See The Washington Post, Sept. 11, 1985, at A1, Col. 2, 3-4.

The proposed Executive Order would also prohibit the consideration of statistical evidence in determining whether a contractor is engaging in prohibited discrimination. Specifically, the proposed Order would look only to a contractor's "demonstrated nondiscriminatory treatment" of its employees and would ignore the number of minorities and women recruited, trained, hired or promoted. Section 2(b)(2) of OMB Proposed Executive Order.

Thus, the proposed Executive Order would bar consideration of statistical evidence no matter how compelling and no matter what weight courts would give to such evidence. As a result, the Executive Order program would no longer focus, as courts and other administrative tribunals do, on employment practices that have a disproportionate impact on women and minorities (known as disparate impact discrimination) or those practices that are based on subjective factors and are proven by statistics (known as disparate treatment). Moreover, this ban on the use of statistics would prevent their consideration even as a recognized indicator of intentional behavior. Rather, in defining what constitutes discrimination, the proposed revisions would look only to relatively isolated forms of blatant, intentional discriminatory acts, thereby ignoring widespread discriminatory practices which work serious harm, whether intentionally or unintentionally. This is in contrast to the approach under the current Executive Order where statistical evidence is relevant and often crucial to an evaluation of employment practices and policies.

It is also possible that the revised Executive Order proposed by OMB could be interpreted to bar all voluntary affirmative action on the part of government contractors. The OMB's proposal states that it neither requires nor provides a legal basis for the use of goals or other discrimination or preferences on the basis of minority status or gender. Elsewhere, the Executive Order mandates that government contractors with the federal government "will not discriminate

against any employee or applicant for employment because of race, color, religion, sex or national origin." Section 202, Executive Order 11,246. By equating the use of goals and other preferential treatment with discrimination, it may be that voluntary use of such affirmative action tools would be prohibited under the OMB's proposed revisions. This change constitutes a particularly disturbing reversal of past governmental policy and also is squarely in conflict with judicial fiat.

These proposed changes would effectively gut the government contract compliance program. They ignore and threaten to undo the demonstrated gains made by women and minorities under the current Executive Order's affirmative action requirements, they run counter to widely accepted notions of appropriate definitions of and remedies for unlawful discrimination, and they conflict with other nondiscrimination standards set forth in statutes and judicial decisions. The most serious consequence of these proposed changes, however, is that they would put the United States government in the position of subsidizing discrimination that is prohibited by the United States Constitution. This type of government subsidy of discrimination is itself violative of the Constitution.

We will first address the Administration's attempts to redefine discrimination in the Executive Order, then the unconstitutional implications of the proposed changes, and finally, the practical problems presented by the proposed revisions' blatant disregard of and proposed conflict with other laws.

II. THE PROPOSED REVISIONS OF THE EXECUTIVE ORDER ATTEMPT TO REDEFINE DISCRIMINATION CONTRARY TO LONGSTANDING NOTIONS OF THE CONCEPT

A. Goals and Timetables are a Widely Accepted and Integral Part of the Executive Order Program

Since the inception of the Executive Order program in 1941, each successive Executive Order has strengthened the purview and substance of the Order. Under President Roosevelt, the coverage of the Executive Order expanded from national defense production[1/] to all government contracts entered into by the War and Navy Departments.[2/] Subsequent Executive Orders added more effective remedies, such as debarment and termination of government contracts,[3/] expanded the Executive Order to add sex to the prohibited categories of discrimination,[4/] and introduced the concept of affirmative action as a means of attaining the goal of full and prompt utilization of women and minorities.[5/] The Executive Order program has been similarly strengthened through regulations, such as those issued by the Nixon

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1/ E.O. 8802, 6 Fed. Reg. 3109, 3 C.F.R. 1938-43 Comp. 957 (June 25, 1941).

2/ E.O. 9001, 6 Fed. Reg. 6787, 3 C.F.R. 1938-43 Comp. 1054 (Dec. 27, 1941); E.O. 9346, 8 Fed. Reg. 7183, 3 C.F.R. 1938-43 Comp. 1280 (May 27, 1943).

3/ E.O. 10,925, 26 Fed. Reg. 1977, 3 C.F.R. 1959-63 Comp. 448 (Mar. 6, 1961).

4/ E.O. 11,375, 32 Fed. Reg. 14,303 (1967).

5/ E.O. 10,925, supra note 3.

Administration which implemented the affirmative action concept through the goals and timetables requirement in effect today.6/

Each successive action strengthening of the Executive Order program was based on the need for a stronger program demonstrated by past experience. The initial phases of the Executive Order program disclosed that passive nondiscrimination clauses alone did not ensure equal opportunity for minorities. President Eisenhower's Committee on Government Contracts, chaired by then Vice President Nixon, concluded that effective remedies were needed to implement the nondiscrimination standards. Early studies of the impact of the Executive Order program before goals and timetables were widely implemented found small but favorable effects on the employment opportunities of minorities, thus confirming the committee's conclusion that more effective enforcement tools were necessary.7/

President Kennedy issued a revised Executive Order which sought to implement the committee's recommendations by imposing an affirmative action requirement on government contractors.8/ However, the Executive Order issued by President Kennedy did not

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6/ Revised Order No. 4, 41 C.F.R. §60-2 (1971).

7/ O. Aschenfelter & J. Heckman, "Measuring the Effect of an Antidiscrimination Program," in Evaluating the Effects of Social Programs (O. Aschenfelter & J. Blum eds. 1976); M. Goldstein & R. Smith, "The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors," in Industrial & Labor Relations Review (July 1976); G. Burman, The Economics of Discrimination, The Impact of Public Policy (unpublished Ph.D. dissertation, University of Chicago 1973); J. Heckman & K. Wolpin, "Does the Contract Compliance Program Work? An Analysis of Chicago Data," in Industrial & Labor Relations Review 544-64 (July 1976).

8/ See supra note 3.

define this affirmative action obligation. In 1968, the Comptroller General ruled that the affirmative action obligation under the Executive Order was too vague to fulfill the requirement that minimum contract standards be made clear to prospective bidders.9/ Contractors echoed this concern over the vagueness of the affirmative action requirement and urged the government to define contractors' obligations under the Order and to establish a standard to measure their compliance with the affirmative action requirement. It was in response to this demonstrated need for a more specific affirmative action program that the Nixon Administration issued the regulations that introduced and defined goals and timetables.

Court orders as well reflected the principle that goals and timetables are required as a means of implementing the affirmative action mandate embodied in the Executive Order. As the culmination of legal challenges to the Department of Labor's failure to effective affirmative action for women in the construction industry, a consent order was entered, which stated:

> In furtherance of the enforcement obligations of the Executive Order, the Department of Labor, by regulation, shall require federal construction contractors to take specific affirmative action steps for women, including goals and timetables.

Advocates for Women v. Marshall, No. 76-0862 and Women Working in Construction v. Marshall, No. 76-527, Order at 2-3 (D.D.C. Dec. 5, 1978).

9/ 48 Comp. Gen. 326 (1968).

Statistics are an integral part of the goals and timetables aspect of the Executive Order program. Through a quantitative analysis of its work force, contractors assess the utilization of women and minorities in different areas of employment. The contractor then undertakes a qualitative analysis to identify and change those employment practices that produce any statistical imbalances. Statistical measures are also useful and inherent in the assessing the success of each contractor's affirmative action program.

Successive administrations strengthened the Executive Order program through the establishment of goals and timetables in response to contractors' demands for measurable standards and the demonstrated ineffectiveness of the Executive Order progam without such standards. The present attempt to eliminate goals and timetables and the use of statistics ignores the lessons of the past.

B. The Administration's Attempts to Weaken Affirmative Action Run Contrary to Widespread Notions of Appropriate Remedies for Past Discrimination

The proposed revisions of the Executive Order seek to redefine discrimination to include remedial actions which take race and sex into account. By eliminating goals and timetables from the Executive Order program and defining such affirmative action efforts as discrimination, the Administration is trying to mandate that remedies for discrimination and prospective affirmative action plans be "color blind." Similarly, by looking only to demonstrated discriminatory treatment irrespective of

quantifiable results, the proposed revisions would eliminate pattern and practice employment cases and although the language is ambiguous they would likely limit the scope of the Executive Order only to forms of intentional discrimination.

Through its efforts to abolish affirmative action and the use of statistical evidence in discrimination cases, this Administration has demonstrated its lack of concern for the women and minorities of this country who suffer the devastating effects of race and sex discrimination. In its attempts to ensure that remedies for discrimination are "color blind," it is the Administration that has blinders on. The Administration's view of what constitutes discrimination is at odds with the longstanding and common sense understanding of that term.

Affirmative action has been widely accepted as a legitimate, constitutional and valid means of redressing discrimination. It is beyond question that courts and Congress can consider race and sex both in determining whether discrimination has occurred and in fashioning a remedy for constitutional and statutory violations of nondiscrimination standards.[10/]

Under the Executive Order, courts have upheld affirmative action as a means of remedying past discrimination.[11/] In considering amendments to Title VII in 1972, Congress rejected all initiatives to end the use of goals and timetables under the

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10/ Racial classifications may be used to vindicate constitutional entitlements. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).

11/ See, e.g., Contractors Association v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

Executive Order.[12] Moreover, in the text of Title VII, Congress has authorized the use of affirmative action. See 42 U.S.C. §2000e-5(9). Courts have recognized, in a Title VII context as well, the appropriateness of statistical measurements and goals and timetables.

The constitutionality of remedial measures which take race and sex into account to overcome the effects of past discrimination is well settled. When faced with challenges to affirmative action, the Supreme Court has held time after time, that discrimination remedies need not be "color blind." In the context of school desegregation, Chief Justice Burger held for a unanimous Court: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[13]

The Supreme Court has opined that remedies for discrimination should serve as the "spur and catalyst" for employers to review their practices to eliminate any vestiges of discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Recent cases have shown a commitment on the part of the

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12/ See 118 Cong. Rec. 1662-76; 2275-76 (1972); Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 915, 927, 1406-07, 1519-20.

13/ North Carolina Board of Education v. Swann, 402 U.S. 43, 46 (1971). In defense of race-conscious remedies in another desegregation case, the Court stated: "Any other approach would freeze the status quo that is the very target of all desegregation processes." McDaniel v. Barresi, 402 U.S. 39, 41 (1971). Even where segregation is not unconstitutional because it did not result from purposeful discrimination, the Supreme Court has held that school authorities may choose as a matter of policy to eliminate racial imbalances. Id.

Court to affirmative action measures designed to eliminate remnants of discrimination.14/

Congress also has great latitude to use race and sex as criteria in attempting to remedy historic discrimination. The Court recently determined that government schemes that use goals to overcome the effects of past discrimination are constitutional. Fullilove v. Klutznick, 448 U.S. 448, 490 (1980). In Fullilove, the Supreme Court expressly rejected the contention that government remedies for past discrimination must be "color blind." Id. at 482. This is especially so where remedial action is induced by placing conditions on federal expenditures. Id.

Up until this point in time, civil rights laws have not been construed to be obstacles to tearing down the process of discrimination they were enacted to dismantle. In United Steelworkers v. Weber, the Supreme Court upheld affirmative race-conscious relief in the face of a reverse discrimination challenge of the sort posited by the Administration as likely under a revised Executive Order.15/ The Court rejected the

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14/ See Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979). See also Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (plurality concluded that eliminating the effects of past discrimination or maintaining racial and ethnic balance is a compelling justification for affirmative action).

15/ In a recent statement about the proposed revisions in the Executive Order, a Justice Department official stated that because the proposed revised Executive Order states that it can not be used to support goals and timetables, it might fuel reverse discrimination suits and that "[t]he Justice Department might even side with the complainants who brought such a case." The Washington Post, Sept. 11, 1985, at A1, Col. 3.

suggestion that the definition of discrimination under Title VII should include affirmative action:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lots of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 205. The Administration appears to be trying to do with the Executive Order what the Supreme Court rejected with Title VII: turn it into a measure perpetuating rather than eradicating race and sex discrimination. The Administration is wrong here, and will hopefully be unsuccessful, just as it was wrong and unsuccessful in its efforts to misuse Supreme Court decisions to further its attempts to dismantle affirmative action under Title VII.16/

16/ The Justice Department has argued that a recent Supreme Court decision supports its campaign to eliminate goals and timetables and other race- and sex-conscious relief from affirmative action under Title VII. In the decision, Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984), the Supreme Court held that courts may not order layoffs that conflict with a bona fide seniority system in order to protect the gains made by women and minorities under a consent decree. The Court based its decision on an express provision of Title VII that protects bona fide seniority systems. The courts have uniformly rejected the Justice Department's effort to expand the Court's ruling beyond the narrow issue before the Court. See Turner v. Orr, 759 F.2d 817 (11th Cir. 1985); Equal Employment Opportunity Commission v. Local 638, of the Sheetmetal Workers' International Association, 753 F.2d 1172 (2d Cir. 1985); Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985); Van Aken v. Young, 750 F.2d 43 (6th Cir. 1984); Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 105 S.Ct. 2015 (1985); Kromnick v. School District of Philadelphia, 739 F.2d 894 (3d Cir. 1984), cert. denied, 105 S.Ct. 782 (1985); Grann v. City of Madison, 738 F.2d 786 (7th Cir.) cert. denied, 105 S.Ct. 296 (1984); Hammon v. Barry, 606 (footnote cont'd)

Moreover, the Administration's crusade ignores not only the case law in the country, but the strong support affirmative action has received from the public. See The Washington Post, Aug. 16, 1985, at A23; "Hiring By The Numbers: Business Vs. Reagan on Affirmative Action," Fortune 26-30 (Sept. 16, 1985); and "Ed Meese is Taking a Jackhammer to Affirmative Action," Bus. Wk. 41 (Sept. 2, 1985). In its attempts to revise the Executive Order to eliminate goals and timetables and the use of statistical evidence, the Administration is out of step with the sentiments of Congress, the courts, past Administrations, and popular views as well.

III. THE PROPOSED EXECUTIVE ORDER VIOLATES CONSTITUTIONAL REQUIREMENTS

A. Federal Government's Constitutional Obligation not to Fund Discrimination

The Executive Order program is constitutionally required by the Fifth Amendment, which prohibits the federal government from discriminating against individuals and groups on the basis of race, national origin and sex.17/ This prohibition goes beyond direct government discrimination. It prohibits the government from aiding, encouraging or promoting actions by private persons which would be unconstitutional if performed by the government

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F.Supp. 1082 (D.D.C. 1985); Deveraux v. Geary, 596 F.Supp. 1481 (D. Mass. 1984), aff'd, 765 F.2d 268 (1st Cir. 1985); Geier v. Alexander, 593 F.Supp. 1263 (M.D. Tenn. 1984).

17/ Bolling v. Sharpe, 347 U.S. 497 (1954).

itself.[18] Providing government funds to private entities that discriminate has been construed to be governmental aid and promotion of discrimination.[19] Accordingly, many courts have held that the government may not allow its funds to support unlawful discrimination.[20] Similarly, the Supreme Court recently found in Bob Jones University v. United States, 461 U.S. 574, 604 (1983), that withdrawal of tax-exempt status from racially discriminatory schools was the least restrictive means available to achieve the government's "fundamental, overriding interest in eradicating racial discrimination." This duty on the part of government to refrain from allowing its funds to support discrimination obligates the government to refrain from

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18/ Board of Education v. Allen, 392 U.S. 236 (1968); Norwood v. Harrison, 413 U.S. 455 (1973).

19/ Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), summarily aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971)(dicta)(tax exemptions and deductions).

20/ Norwood v. Harrison, 413 U.S. 455 (1973)(government may not grant financial assistance if it has the tendency to facilitate, reinforce, or support private discrimination). See also Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974)(Tax-exempt philanthropy is limited to the extent it does not ensure the absence of discrimination); Player v. State of Alabama Department of Pensions & Security, 400 F. Supp. 249 (M.D. Ala. 1975), aff'd without opinion, 536 F.2d 1385 (5th Cir. 1976)(dicta)(government has a duty to make a determination of actual compliance with the Equal Protection Clause before giving or continuing to give financial assistance).

contracting with private employers who practice employment discrimination.21/

As part of its obligation not to fund discrimination, the government must maintain an effective enforcement and compliance scheme. Courts have recognized that through federal funding, "the government has become sufficiently entwined with private parties to call forth a duty to ensure compliance with the Fifth Amendment by the parties through whom it chooses to act." McGlotten v. Connally, 338 F. Supp. 448, 456-57 (D.D.C. 1972). Thus, the government must conduct a reasonable investigation and otherwise ensure that potential contractors are not engaging in discriminatory employment practices before entering into or extending federal contracts. McNeal v. Tate County School District, 460 F.2d 568, 571-72 (5th Cir. 1971); Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

The government's duty not to fund unconstitutional discrimination extends even further. The government must ensure that its funds are not used in ways that perpetuate the effects

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21/ In Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967), the court held that a state government may not enter into construction contracts with private parties that discriminate in employment.

of past discrimination.22/ The Supreme Court has recognized the inherent inequities in allowing the effects of past discrimination to persist and has stated that courts have a duty to issue orders that move toward the elimination of the effects of past discrimination as well as that bar discrimination in the future. Franks v. Bowman Transportation Co. Inc., 424 U.S. 747, 770 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Louisiana v. United States, 380 U.S. 145, 154 (1965). More particularly, in Kelsey v. Weinberger, 498 F.2d 701 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia held invalid regulations promulgated under the Emergency School Aid Act which would permit federal financial assistance to school districts that had not demonstrated that past discriminatory practices had ceased. The court stated explicitly that the government has an obligation not to provide federal funds where the effects of past discrimination persist. Id. at 710. Thus,

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22/ Discrimination against minorities and women should now be viewed as an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior. That process, started by past events, now routinely bestows privileges, favors and advantages on white males, and imposes disadvantages and penalties on minorities and women. This process is also self-perpetuating. Many normal, seemingly neutral operations of our society create stereotyped expectations that justify unequal results; unequal results in one area foster inequalities in opportunity and accomplishment in others; the lack of opportunity and accomplishment confirms the original prejudices or engenders new ones that fuel the normal operations generating the unequal results. United States Commission on Civil Rights, Affirmative Action in the 1980's Dismantling the Process of Discrimination 13 (1981)[Clearinghouse Publication 70].

the government is further obligated to ensure that government money is not used in such a way that perpetuates the effects of past discrimination.

As one court ruled in construing a plan which implemented the Executive Order nondiscrimination proviso, "If the requirements of the Plan are so minimal that they result, albeit unintentionally, in governmental acquiescence in racially discriminatory practices, then greater efforts are mandated by the Constitution and federal law." Percy v. Brennan, 384 F. Supp. 800, 812 (S.D.N.Y. 1974).

B. The Current Executive Order Scheme is Constitutionally Required

By prohibiting federal contractors from engaging in unlawful discrimination and by requiring them to take affirmative steps to remedy the effects of past discrimination, the Executive Order merely implements what is a clear constitutional obligation not to provide federal funds to any companies that have discriminatory employment practices and policies. In this way, the Executive Order ensures that government funds will not be put to discriminatory uses by either the government itself or private persons. Moreover, the current Executive Order scheme, set out in Department of Labor regulations, is the sort of effective compliance system that is required by the Constitution. See 41 C.F.R. pt. 60-1 (1985).

1. Goals and Timetables Are Necessary

Affirmative action, as it exists under the Executive Order, has proven necessary for effective implementation of the nondiscrimination proviso. As discussed above, early experience under the Executive Order program demonstrated that nondiscrimination clauses alone did not eliminate discriminatory practices by government contractors. Early on, it became clear that more effective remedies were needed to implement the nondiscrimination proviso. Studies of the Executive Order program before the widespread use of goals and timetables also disclosed only small gains in employment opportunities of minorities. See supra note 7.

Later studies, which focused on the period when goals and timetables were in widespread use, found positive employment effects of a substantially greater magnitude than those found before goals and timetables were as prevalent.23/ These studies compared the employment of minorities and women in government contractor firms with that in noncontractor firms and found greater increases in employment opportunities for women and minorities in government contractor firms. One study also found that compliance reviews aided women and minorities in that

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23/ Office of Federal Contract Compliance, Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980 (U.S. Dep't of Labor, Washington D.C. June 1984); J. Leonard, The Impact of Affirmative Action (National Bureau of Economic Research, Cambridge, Mass. and Institute of Industrial Relations and School of Business Administration, University of California at Berkeley, July 1983).

employment opportunities were greater at those establishments where compliance reviews had been conducted.24/ These studies show that a nondiscrimination proviso, alone, was only mildly effective in increasing employment opportunites for women and minorities, but when coupled with effective enforcement tools, such as goals and timetables, employment opportunites for protected classes improved more notably.

Courts have recognized the necessity of goals and timetables to overcome the effects of past discriminatory practices. In Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978), Justice Blackmun stated:

> [I]t would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot--we dare not--let the Equal Protection Clause perpetuate racial supremacy.

In Southern Illinois Builders Ass'n v. Ogilvie, the court stated:

> [W]e believe that "numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality."25/

Similarly, the Department of Labor which is charged with enforcing the Executive Order has concluded based on its experience that goals and timetables are the most concrete and effective system for increasing the representation of women and

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24/ J. Leonard, supra note 23.

25/ 471 F.2d 680, 686 (7th Cir. 1972), quoting Note, "Developments in the Law -- Employment Discrimination and Title VII of the Civil Rights Act of 1964," 84 Harv. L. Rev. 1109, 1134 (1971).

minorities where they have previously been un- or under-represented.[26] This subcommittee has also found that: "Race and sex-conscious class remedies must be retained as the most effective and most efficient means of redressing past discrimination."[27]

Affirmative action comparable to that currently in place under the Executive Order is constitutionally required because it is essential to remedy the effects of past discrimination. The Executive Order nondiscrimination proviso without affirmative action did not accomplish this result. Therefore, the current system of goals and timetables must be kept in place to ensure that government funds do not subsidize unlawful discrimination.

2. Statistical Evidence

Statistical evidence is a necessary measure of discriminatory behavior because so much discrimination is masked in seemingly neutral behavior. Courts routinely rely on statistical evidence in deciding employment discrimination cases

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26/ 43 Fed. Reg. 20,761 (1978).

27/ Subcommittee on Employment Opportunities, Committee on Education and Labor, House of Representatives, 97th Cong., 2d Sess., Report on Affirmative Action and The Federal Enforcement of Equal Employment Opportunity Laws 10 (Feb. 1982).

and the Supreme Court has consistently held that statistics are an important source of evidence in discrimination cases.28/

The rationale for relying on statistical evidence has been aptly stated by the Supreme Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977):

> [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Evidence that this has not occurred, in the form of work force statistics, is probative of discriminatory behavior.

The proposed ban on the use of statistical evidence runs contrary to the approach employed by courts and administrative tribunals in determining whether discrimination has occurred. It would compel ignorance of relevant and often crucial information in assessing compliance with and progress under the nondiscrimination prohibition of the Executive Order.

In addition to unwisely limiting the Executive Order to intentional discrimination, the proposed ban on the use of statistical evidence places limits on the extent to which even intentional discrimination can be found to violate the constitutional standards under Executive Order. The Supreme Court has recognized that statistics showing inequitable employment opportunities for women or minorities are probative in employment discrimination cases because they are often a telltale

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28/ See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood School District v. United States, 433 U.S. 299, 308 & n.13 (1977).

sign of purposeful discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40 n. 20 (1977). Accordingly, statistical evidence may give rise to an inference of a discriminatory purpose. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 256 (1977). The Supreme Court has underscored the importance and necessity of looking beyond intentional discriminatory acts: "The Equal Protection Clause would be a sterile promise if [government] involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." Norwood v. Harrison, 413 U.S. 455, 466-67 (1973). The proposed ban on the use of statistical evidence would stand in the way of ascertaining whether the government is subsidizing unconstitutional discrimination.

IV. THE PROPOSED EXECUTIVE ORDER CONFLICTS WITH OTHER LAW

In addition to conflicting with constitutional standards, as already discussed, the proposed revisions of the Executive Order present other problems because they conflict with the current law under other statutes, most particularly Title VII but also state fair employment laws that have been predicated on longstanding federal standards under Title VII and the Executive Order. Title VII of the Civil Rights Act of 1964 authorizes courts to order affirmative action relief in employment discrimination cases.

Section 706(g) of Title VII, 42 U.S.C. §2000e-5(9). Moreover, under Title VII, courts have gone much further than the goals and timetables concept embodied in the Executive Order program and have established mandatory quotas as a remedy for past discrimination.29/

Government contractors would be placed in the untenable position of being required to meet conflicting standards. While courts could require affirmative relief under Title VII and state administrative tribunals and courts could impose goals and timetables or some other form of affirmative relief under state fair employment laws, numerical preferences would not be required and might even be prohibited depending on the version of the proposed Executive Order at issue.

Similarly, under current law as discussed above, statistical evidence can be used to show discrimination in the absence of intent and to give rise to an inference of discriminatory intent. The use of statistics has enabled courts to focus on employment patterns and practices rather than specific discriminatory acts. However, under the proposed revisions of the Executive Order, statistical evidence would be barred. Therefore, the definition and proof of discrimination would also differ depending on the underlying nondiscrimination proviso.

29/ See e.g., Davis v. County of Los Angeles, 566 F.2d 1334, 1344 (9th Cir. 1977); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc); Vulcan Soc'y of the New York City Fire Department v. Civil Serv. Comm'n, 490 F.2d 387, 398-99 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 736-37 (5th Cir. 1972).

CONCLUSION

The Administration's proposals to dismantle the Executive Order program follow on the heels of similar attempts to reverse this and other civil rights policies. Early in President Reagan's first term, the Office of Federal Contract Compliance Programs proposed regulations that would weaken the affirmative action mandate of the Executive Order.30/ After negative public comment, the proposals were never adopted. However, the Administration began quietly and surreptitiously to implement many of the proposed changes through policy directives and weaker enforcement strategies.

Now, the Administration is trying an even more extreme approach--to destroy the very Executive Order itself. Moreover, this Administration is so eager to dismantle civil rights protections afforded women and minorities under the Executive Order program that it is implementing some of the proposed revisions of the Executive Order. I know of at least one instance in which a complainant in an OFCCP case has been led to believe that a new Executive Order is already in effect which prevents the Solicitor of Labor from bringing an enforcement action on her behalf despite previous findings of discrimination. This complainant was also informed that statistics could no longer be used to find discrimination and hence that her case no longer had merit.

30/ 46 Fed. Reg. 42,968 (Aug. 25, 1981); 47 Fed. Reg. 17,770 (Apr. 23, 1982).

In other areas as well, the Administration has embarked on an ill-conceived crusade to close the doors to women and minorities. The Administration has its eye on substantial revisions of an interagency agreement that sets a uniform government position on discriminatory employee selection procedures, which would lessen the use of statistical evidence and disparate impact standards.31/ The Department of Justice no longer negotiates specific goals and timetables in settling complaints of illegal discrimination and the Equal Employment Opportunity Commission now limits its cases to those of individual discrimination rather than the more far-reaching pattern and practice cases and disfavors the use of goals and timetables.32/ The Department of Justice has argued positions that run directly contrary to those advocated by past Administrations, Republican and Democratic alike,33/ and has sought to intervene in other cases to present its arguments

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31/ Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (July 1,1985).

32/ See, e.g., United States v. New Hampshire, Civ. Action No. C81-457-0 (D.N.H. Sept. 17, 1981)(consent decree); Statements of Clarence Thomas, Chairman of the Equal Employment Opportunity Commission, Daily Labor Report No. 221 (Nov. 15, 1984).

33/ Geier v. Alexander, 593 F.Supp. 1263, 1265 (M.D. Tenn. 1984) (Justice Department objected to proposed settlement because it included race-conscious remedies for persons who were not actual victims of discrimination). See also Grove City College v. Bell, 104 S. Ct. 1211 (1984).

against race-conscious remedies for discrimination.[34/] Most recently, the Department of Justice has sought to reopen settled consent decress to which the government was previously a party by claiming that affirmative action measures contained therein are impermissible.[35/]

The proposals to revise the Executive Order illustrate a callous attitude toward the persistent discrimination faced by women and minorities in the sphere of employment. They would reverse the commitment of past Administrations, Republicans and Democrats alike, to ensure that government funds do not support unconstitutional discrimination against women and minorities. Adoption of this ill-conceived order would surely be met by legal challenges to its constitutionality for it would place the government in the abhorrent position of subsidizing prohibited discrimination. This would truly be a travesty.

34/ See, e.g., Britton v. South Bend Community School Corporation, No. 84-2841 (7th Cir.) (Department filed brief in Jan. 1985 which argued affirmative action can only be given to proven discriminatees to restore them to the position they would have occupied in the absence of discrimination); Bratton v. City of Detroit, No. 80-1837, Order (6th Cir. May 27, 1983) (Department sought to intervene to argue against the court of appeals' acceptance of race-conscious affirmative action); Hammon v. Barry, 606 F.Supp. 1082, 1086, 1094 (D.D.C. 1985) (Department filed complaint in March 1985 which argued that Title VII prohibits affirmative relief for persons who were not actual victims of discrimination).

35/ See N.Y. Times, Apr. 3, 1985, at 9, Col. 1.

Mr. MARTINEZ. Thank you, Ms. Greenberger. I'm going to ask the panel's indulgence. We have with us today Mayor Holland of Trenton, and he has a 12:40 plane to catch. So we're going to ask if you will please allow Mr. Holland to come forward and make his statement, so that he might catch that plane.

Further, I'm going to ask your indulgence. I've gotten a call that I have to go out. So I will allow Mr. Hayes to chair the meeting while I'm gone.

Mr. HAYES. You may not have to move. Just remain there, and let the mayor come forward.

Welcome to our hearing, Mr. Mayor.

STATEMENT OF ARTHUR J. HOLLAND, MAYOR OF TRENTON, NJ, U.S. CONFERENCE OF MAYORS

Mr. HOLLAND. Thank you, Mr. Hayes, Mr. Martinez and other members of the subcommittee and members of the panel for granting me this courtesy.

I appear before you—My name is Arthur J. Holland, mayor of Trenton—on behalf of the U.S. Conference of Mayors where I chair the Subcommittee on Civil Rights and serve as a trustee of the organization.

I am pleased to be with you, because you are examining a very important issue, the use of Federal contracts to remedy discrimination in the workplace.

There are over 75,000 business establishments which are Federal prime contractors, employing over 21 million people in the United States and thousands more subcontractors. The Federal Contract Compliance Program, if strongly enforced, can by itself go a long way toward assuring a fully integrated national work force.

Indeed, a 1984 study by the Office of Federal Contract Compliance Programs provides clear and conclusive evidence that affirmative action is an effective means of achieving a much fairer representation of minorities and women in Federal contract work forces. That's been the experience in our own city of Trenton. In that study, the work forces of 49,000 Federal contractors and 28,100 non-Federal contractors were examined in 1974, and again in 1980.

In 1974 Federal contractor work force compositions reflected employment discrimination practices which antidated the establishment of effective compliance programs. The report states that typically Federal contractor establishments had the best paying jobs, and competition for these jobs was most intense.

It was also in those establishments that some of the most jealously guarded systems of preference for white males were prevalent. Where minorities were employed, they were found almost entirely in the so-called 3–H jobs, hard, hot, and heavy. Women were concentrated in clerical or low paying semiskilled jobs.

By 1980, after several years of affirmative action compliance efforts by the OFCCP with Federal contractors, it was found that Federal contractors had made substantially greater improvements in their work force patterns than those who did not contract with the Federal Government. Minorities in officials' and managers' jobs increased 57 percent among firms contracting with the Federal

Government between 1980 and 1974, compared to a 32 percent increase among non-Federal contractors.

For professionals, the increase was 57 percent at firms contracting with the Federal Government, and 11 percent at those which were not Federal contractors. For technicians, 45 percent, compared with 6 percent. For salesworkers, 56 percent versus 21 percent.

Similarly, the growth of female employment among Federal contractors substantially exceeded increases among non-Federal contractors during the same time period. For example, females in professional jobs increased 50 percent in Federal contractor firms and 10 percent in noncontractor firms. The growth was 47 percent among officials and managers in contractor firms, compared to 18 percent among non-Federal contractors.

This Labor Department report presents a solid body of evidence that affirmative action requirements in Federal contracting can be an effective tool in promoting equal employment opportunities in the workplace. In response to this, the Conference of Mayors adopted a policy last year which calls for strengthening, not weakening, our existing laws and policies. In that policy, we urged Congress to adopt legislation or the executive branch to issue Executive orders which would:

Award added points in the bidding process for Federal contractors to minority and women-owned firms, and to all firms regardless of ownership characteristics, which have received a certificate of merit by meeting affirmative action goals. To achieve a certificate of merit, a firm must have or must be working toward fully representative levels of minorities and women at all wage and salary levels of the firm; and further, provide that at least 10 percent of all Federal contracting in all agencies be awarded to minority firms or firms from higher labor surplus areas.

The Conference of Mayors strongly opposes any efforts by this administration to weaken affirmative action requirements in Federal contracts. We have been concerned about the decrease in enforcement efforts by the OFCCP, but even more serious are the amendments that have been proposed to Executive Order 11246.

As you know, these amendments would require companies only to engage in "affirmative recruitment and employment related training programs." Companies would not be obligated to hire or promote. In addition, the order would prohibit the use of statistical evidence, a court approved device for confirming discrimination, to measure contractors' hiring and promotion records.

The president of the Conference of Mayors, Dutch Morial of New Orleans, sent a letter to President Reagan on August 21 urging that he reject these proposed amendments. That letter is attached to my statement, and we ask that it be entered into the record.

If the President does not respond affirmatively to our letter and to the letter that you have sent today and that countless others across the Nation have sent, we call on this subcommittee to draft legislation that would at least maintain the current affirmative action requirements in Federal contracting, and that, if possible, would strengthen these requirements to encourage even greater hiring and promotion opportunities for minorities and women.

Be assured that the U.S. Conference of Mayors stands ready to work with you to achieve passage of any such legislation.

I am honored to have had the opportunity to appear before you this morning, and now I will try to answer any questions you might have.

[The prepared statement of Arthur J. Holland follows:]

Prepared Statement of Arthur J. Holland, Mayor or Trenton, Chairman, Subcommittee on Civil Rights, U.S. Conference of Mayors

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Mayor of Baltimore
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Mayor of Juneau
HAROLD WASHINGTON
Mayor of Chicago

Executive Director:
JOHN J. GUNTHER

August 21, 1985

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We understand that you will shortly be reviewing a draft executive order that would repeal requirements that federal contractors set numerical goals to remedy discrimination in the workplace. These proposed amendments would eliminate a major tool against discrimination which has been in force for decades.

The draft order would require companies only to engage in "affirmative recruitment and employment-related training programs." Companies would not be obligated to hire or promote. In addition the order would prohibit the use of statistical evidence, a court-approved device for confirming discrimination, to measure contractors' hiring and promotion records.

Affirmative action in hiring minority workers was first required of federal contractors in 1961 by President Kennedy. The requirements were strengthened by President Johnson in 1965. Numerical goals and timetables to implement affirmative action were first developed and enforced during the Nixon Administration. These requirements have led to the increased hiring and promotion of minorities and women by federal contractors. The changes proposed would halt the progress that has been made.

On behalf of the nation's mayors, I urge you to reject the proposed amendments to Executive Order 11246.

Sincerely yours,

Ernest N. Morial
Mayor of New Orleans
President

Chairman Martinez and members of the Subcommittee, I am Arthur J. Holland, Mayor of Trenton. I appear before you this morning on behalf of the U.S. Conference of Mayors, where I chair the Subcommittee on Civil Rights and serve as a trustee of the organization. I am pleased to be with you because you are examining a very important issue -- the use of federal contracts to remedy discrimination in the workplace.

There are over 75,000 business establishments which are federal prime contractors, employing over 21 million people in the United States, and thousands more subcontractors. The federal contract compliance program, if strongly enforced, can by itself go a long way toward assuring a fully integrated national workforce.

Indeed, a 1984 study* by the Office of Federal Contract Compliance Programs provides clear and conclusive evidence that affirmative action is an effective means of achieving a much fairer representation of minorities and women in federal contractor workforces. In that study the workforces of 49,000 federal contractors and 28,100 non-federal contractors were examined in 1974 and again in 1980.

In 1974, federal contractor workforce compositions reflected employment discrimination practices which antedated the establishment of effective compliance programs. The report states that,

*U.S. Department of Labor, "Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980," (Washington, D.C., Office of Federal Contract Compliance Programs, June, 1984).

"typically, federal contractor establishments had the best-paying jobs, and competition for these jobs was most intense. It was also in those establishments that some of the most jealously guarded systems of preference for white males were prevalent. Where minorities were employed, they were found almost entirely in the so-called '3-H' jobs -- hard, hot and heavy." Women were concentrated in clerical or low-paying semi-skilled jobs.

By 1980, after several years of affirmative action compliance efforts by the OFCCP with federal contractors, it was found that federal contractors had made substantially greater improvements in their workforce patterns than those which did not contract with the federal government. Minorities in officials and managers jobs increased 57 percent among firms contracting with the federal government between 1980 and 1974, compared to a 32 percent increase among non-federal contractors. For professionals, the increase was 57 percent at firms contracting with the federal government, 11 percent at those which were not federal contractors; for technicians, 45 percent compared with six percent; for sales workers, 56 percent versus 21 percent.

Similarly, the growth of female employment among federal contractors substantially exceeded increases among non-federal contractors during the same time period. For example, females in professional jobs increased 50 percent in federal contractor firms and 10 percent in non-contractor firms; the growth was 47 percent

among officials and managers in contractor firms compared to 18 percent among non-federal contractors.

This Labor Department report presents a solid body of evidence that affirmative action requirements in federal contracting have been an effective tool in promoting equal employment opportunities in the workplace. In response to this the Conference of Mayors adopted a policy last year which calls for strengthening -- not weakening -- our existing laws and policies. In that policy we urged Congress to adopt legislation or the executive branch to issue executive orders which would:

- award added points in the bidding process for federal contracts to minority and women-owned firms and to all firms, regardless of ownership characteristics, which have received a certificate of merit by meeting affirmative action goals. To achieve a certificate of merit a firm must have or must be working toward fully representative levels of minorities and women at all wage and salary levels of the firm; and

- provide that at least 10 percent of all federal contracting in all agencies be awarded to minority firms or firms from higher labor surplus areas.

The Conference of Mayors strongly opposes any efforts by this Administration to weaken affirmative action requirements in federal contracts. We have been concerned about the decrease in enforcement efforts by the OFCCP. But even more serious are the amendments that have been proposed to Executive Order 11246. As you know, these amendments would require companies only to engage in "affirmative recruitment and employment-related training programs." Companies would not be obligated to hire or promote. In addition the order would prohibit the use of statistical evidence, a court-approved device for confirming discrimination, to measure contractors' hiring and promotion records.

The President of the Conference of Mayors, Dutch Morial of New Orleans, sent a letter to President Reagan on August 21, 1985, urging that he reject these proposed amendments. That letter is attached to my statement and we ask that it be entered into the record. If the President does not respond affirmatively to our letter and to the letter that you have sent yesterday and those that countless others across the nation have sent, we call on this Subcommittee to draft legislation that would at least maintain the current affirmative action requirements in federal contracting and that, if possible, would strengthen these requirements to encourage even greater hiring and promotion opportunities for minorities and women.

Be assured that the U.S. Conference of Mayors stands ready to work with you to achieve passage of any such legislation. I am honored to have had the opportunity to appear before you this morning and will try to answer any questions you might have.

Mr. HAYES. Thank you, Mayor Holland, for coming here today. Rather than to ask you a legal question on affirmative action, let me express what I sometimes think the administration is doing and see if you agree with me.

You've given figures for the amount the contractors have done with the private sector. Do you think the administration is trying to be nice guys to the employers of this country by getting the Government off their backs, while they're doing business with the Government?

Mr. HOLLAND. I think there's been a weakening generally in this area. The Civil Rights Commission, we all know, through appointments has become less requiring of employers and of institutions on such matters, and there does seem to be a definite preference toward the employer and a move away from consideration for the minority employee.

The administration's emphasis is certainly not a positive one on this matter, and that's why we make such a strong statement today. I hope that this subcommittee would respond accordingly.

Mr. HAYES. Let me ask a final judgment question. Why should the U.S. Conference of Mayors or the Federal Government care that the Executive order may be eviscerated, and what impact would it have on the public sector contracting?

Mr. HOLLAND. Our conference represents municipalities of 30,000 population or more, and especially the old, large, central cities; and it is in those communities where there is a disproportionate number of disadvantaged. Any mayor of such a city can tell you of daily coming to his office of men and women who are unemployed and again disproportionately minority members of our society.

The fact is, realistically, that unless there's a positive and affirmative effort to assist such persons in our communities to get into the employment roles, then they're going to continue as they are as burdens on society rather than those who would become employers and pay taxes and address the deficit which has been on everybody's mind.

Mr. HAYES. I want to say in conclusion, I thank you on behalf of the subcommittee and the chairman, Congressman Martinez, for your appearing here on behalf of the Conference of Mayors. You may rest assured that your entire testimony will become a part of the record of this committee, and the suggestions as reflected by the letter which was sent from the Conference of Mayors, from your chairman from New Orleans, will also be a part of the record.

Thank you very much.

Mr. HOLLAND. Thank you very much, and thanks to the panel again.

Mr. HAYES. Let me ask the indulgence of the panel which is already before us to just be patient, and I will go vote. I'll be back in roughly 15 minutes. Let me run and vote. It's part of my credo to not miss too many votes when I'm here.

Please stand in recess for 15 minutes.

[Recess.]

Mr. HAYES. If we will be in order, our hearing will resume.

The next witness is Mr. Flemming, Chairman of the Citizen's Commission on Civil Rights.

STATEMENT OF ARTHUR FLEMMING, CHAIRMAN, CITIZENS' COMMISSION ON CIVIL RIGHTS

Mr. FLEMMING. Mr. Chairman, as Chairman of the Citizens' Commission on Civil Rights, I certainly want to express to you and your colleagues our appreciation as a commission for the opportunity you have afforded us to participate in this oversight hearing on affirmative action.

Mr. Chairman, I would like to have the opportunity at this point in my testimony to insert the names of the members of the Citizen's Commission. You know the membership, that it is a bipartisan membership made up of persons who have served in the Cabinet and served in other key positions in the Federal Government.

In transmitting the President's proposed budget for 1986 to the Congress, the Office of Management and Budget also submitted a document entitled "Special Analyses." Included in these special analyses was one entitled "Civil Rights Activities." This analysis included a discussion of the implementation of Executive Order 11246, prohibiting employment discrimination by Government contractors.

After identifying the efforts that would be made in 1986 (quote) ". . . to achieve substantial reforms" in the regulations issued under the Executive order, the administration says in this Special Analyses that it "would not pretend to mandate any bottom line result, other than nondiscrimination."

Obviously, they haven't waited until 1986. They're underway already.

In June 1984 the Citizens' Commission on Civil Rights, after a careful examination of the relevant evidence and in-depth discussions as a collegial body, issued a report entitled "Affirmative Action to Open the Doors of Job Opportunity: A Policy of Fairness and Compassion that Has Worked."

In the introduction to the monograph we said: "The current controversy pits advocates of neutrality, who believe that mere termination of discriminatory practices is sufficient, against proponents of affirmative action who urge the need for additional measures to redress discrimination and to prevent it from recurring in the future."

In finding No. 5 we said this:

> Affirmative action remedies have led to significant improvements in the occupational status of minorities and women. Gains have occurred in the professions, in managerial positions, in manufacturing and trucking, in police and fire departments and other public service positions. These gains are linked specifically to enforcement of the goals and timetable requirements of the contract compliance program and to court orders and consent decrees for ratio hiring.

The controversy that has led to these hearings pits those who know, as a result of study, observation, and experience, that affirmative action does open the doors of employment opportunity for the victim of discrimination against an administration that seems determined to eliminate from affirmative action ingredients that play a major role in making it work, such as goals and timetables and a statistical evaluation of an employer's work force.

Our Commission considered and reached conclusions on major issues involved in this controversy.

We considered the continuing allegation, for example, that the implementation of Executive Order 11246 has led to the imposition of quotas.

We called attention to a Statement of Federal Policy issued in March 1973 by chairpersons of the U.S. Civil Service Commission, the Equal Employment Opportunity Commission, the Assistant Attorney General for Civil Rights and the Acting Director of the Office of Federal Contract Compliance.

That statement defined the term quota as an absolute requirement that an employer hire a certain number or percentage of employees from a specified group without regard to the availability of qualified candidates or the presence of more qualified members of other groups.

Our Commission said:

> This Commission knows of no case in which a Federal court or agency ever has imposed on an employer a quota as so defined. Nor has any Federal court or agency favored such a remedy.

We concluded that the Supreme Court's decisions in *Bakke, Weber* and *Fullilove* cases strongly indicate that race conscious remedies, including goals and ratios, are a lawful means for dealing with the effects of prior discrimination. Contrary to the position taken by the Justice Department, the Court's decision in the *Memphis Firefighters* case is confined to protecting white workers who have seniority from being laid off, and does not throw prior decisions or race conscious remedies in hiring or promotion into doubt.

The efforts of the Justice Department to use this case as a vehicle for undermining affirmative action have been indefensible. These efforts have been rejected by the courts, the media and many employers.

We concluded also that affirmative action remedies have not been unfair to white male workers. I amplify that in my testimony. We likewise concluded that affirmative action policy is consistent with principles of merit.

We also documented our conclusion that affirmative action policies are oftentimes not just tolerated but actively supported by responsible leaders in the business community.

In our 1984 report we reached this conclusion: The Reagan administration has reversed the policy of its four predecessors and has attempted to undermine the use of affirmative action. The administration has launched a concerted attack on affirmative action remedies of the courts and has sought to weaken regulation governing the use of goals and timetables.

It has also sought to undercut implementation of affirmative action policy by slashing agency budgets and enforcement activity. Except for its view that whites with seniority should not be laid off to protect affirmative action gains, the administration has met with failure in the courts. Nevertheless, the administration's opposition poses a serious threat to equal job opportunity for minorities and women.

The events since then have added up to an acceleration of the determination to pull the rug out from under affirmative action. In 1984 efforts were concentrated on weakening the regulations gov-

erning the use of goals and timetables. In 1985 the effort is to replace the present Executive Order with a watered down version.

The only way to bring this assault to a halt is for the Congress to approve a bill that will incorporate into law the essential features of Executive Order 11246 and then, if necessary, pass it over a Presidential veto.

I conclude with the last sentence from the Citizens' Commission report:

> The long history and experience of this nation's struggle against injustice suggests that, unless people remain steadfast in their determination to act affirmatively to correct past wrongs, the policy will be abandoned while the person who has been hobbled by chains is still far behind in the face.

Thank you, Mr. Chairman.

[The prepared statement of Arthur S. Flemming follows:]

PREPARED STATEMENT OF ARTHUR S. FLEMMING, CHAIRMAN, CITIZENS' COMMISSION ON CIVIL RIGHTS

I. Introduction

A. As Chairman of the Citizens' Commission on Civil Rights, I desire to express our appreciation for the opportunity you have afforded us to participate in this oversight hearing on affirmative action.

B. In transmitting the President's proposed budget for 1986 to the Congress, the Office of Management and Budget also submitted a document entitled, "Special Analyses".

1. Included in these special analyses was one entitled "Civil Rights Activities".

2. This analysis included a discussion of the implementation of Executive Order 11246 prohibiting employment discrimination by government contractors.

3. After identifying the efforts that would be made in 1986 "to achieve substantial reforms" in the regulations issued under the Executive Order the Administration says in this Special Analyses that it "would not pretend to mandate any 'bottom line' result, other than non-discrimination."

C. In June, 1984 the Citizens' Commission on Civil Rights, after a careful examination of the relevant evidence and in-depth discussions as a collegial body, issued a report entitled, "Affirmative Action to Open the Doors of Job Opportunity: A Policy of Fairness and Compassion that Has Worked".

1. In the Introduction to the monograph we said: "The current controversy pits advocates of 'neutrality', who believe that mere termination of discriminatory practices is sufficient, against proponents of 'affirmative action', who urge the need for additional measures to redress discrimination and to prevent it from recurring in the future."

2. In Finding No. 5 we said: "Affirmative action remedies have led to significant improvements in the occupational status of minorities and women. Gains have occurred in the professions, in managerial positions, in manufacturing and trucking, in police and fire departments and other public service positions. These gains are linked specifically to enforcement of the goals and timetable requirements of the contract compliance program and to court orders and consent decrees for ratio hiring."

D. The controversy that has led to these hearings pits those who know, as a result of study, observation and experience that affirmative action does open the doors of employment opportunity for the victim of discrimination against an Administration that seems determined to eliminate from affirmative action ingredients that play a major role in making it work, such as goals and time tables and a statistical evaluation of an employer's workforce.

E. Our Commission considered and reached conclusions on major issues involved in this controversy.

II. Body

A. We considered the continuing allegation, for example, that the implementation of Executive Order 11246 has led to the imposition of quotas.

1. We called attention to a Statement of Federal Policy issued in March, 1973 by chairpersons of U. S. Civil Service Commission and the EEOC, the Assistant Attorney General for Civil Rights, and the Acting Director of Office of Federal Contract Compliance.

2. That statement defined the term "quota", as an absolute requirement that an employer hire a certain number or percentage of employees from a specified group, without regard to the availability of qualified candidates or the presence of more qualified members of other groups.

3. The Citizens' Commission said: "This Commission knows of no case in which a Federal court or agency ever has imposed on an employer a "quota" as so defined. Nor has any Federal court or agency favored such a remedy."

B. We concluded that the Supreme Court's decisions in Bakke, Weber and Fullilove cases strongly indicate that race conscious remedies, including goals and ratios, are a lawful means for dealing with the effects of prior discrimination

1. Contrary to the position taken by the Justice Department, the Court's decision in the Memphis Firefighters case is confined to protecting white workers who have seniority from being laid off, and does not throw prior decisions or race conscious remedies in hiring or promotion into doubt.

2. The efforts of the Justice Department to use this case as a vehicle for undermining affirmative action have been indefensible.

3. These efforts have been rejected by the courts, the media, and many employers.

C. We concluded that affirmative action remedies have not been unfair to white male workers.

The courts have held that the expectations of such workers in some circumstances may be disappointed by affirmative action remedies in order to withdraw the unfair economic advantage that white males have derived from discrimination. But the courts have protected the interests of white male workers by carefully constraining affirmative action remedies. They have held for example, that such workers may not be displaced from their jobs and that remedies must be limited in duration.

D. We concluded that affirmative action policy is consistent with principles of merit.

It has not required or encouraged the hiring or promotion of unqualified persons. Nor is there evidence that the policy has been abused in practice. Rather, affirmative action has offered to people the opportunity to compete and prove their own merit.

E. We documented our conclusion that affirmative action policies are oftentimes not just tolerated but actively supported by responsible leaders in the business community.

1. For many companies, affirmative action has resulted in a larger pool of qualified workers, streamlined personnel procedures with a more precise identification of job requirements and expanded markets for their products.

2. Also there is evidence that affirmative action can result in benefits to the workforce as a whole, not just to minorities and women. Benefits include fairer and more open procedures for hiring and promotion (altering "old boy networks" and nepotistic practices), the elimination of job criteria that are not related to performance, and enhanced employer sensitivity to such employee needs as counseling and fair grievance procedures.

III. Conclusion

A. In 1984, the Citizens' Commission reached this conclusion:

The Reagan Administration has reversed the policy of its four predecessors and has attempted to undermine the use of affirmative action. The Administration has launched a concerted attack on affirmative action remedies in the courts and has sought to weaken regulations governing the use of goals and timetables. It also has sought to undercut implementation of affirmative action policy by slashing agency budgets and enforcement activities. Except for its view that whites with seniority should not be laid off to protect affirmative action gains, the Administration has met with failure in the courts. Nevertheless, the Administration's opposition poses a serious threat to equal job opportunity for minorities and women.

B. The events since then have added up to an acceleration of the determination to pull the rug out from under affirmative action.

1. In 1984 efforts were concentrated on weakening the regulations governing the use of goals and timetables; in 1985 the effort is to replace the present executive order with a watered-down version.

C. The only way to bring this assault to a halt is for the Congress to approve a bill that will incorporate into law the essential features of Executive Order 11246 and then, if necessary, pass it over a Presidential veto.

D. I conclude with the last sentence from the Citizens' Commission's report:

"The long history and experience of this nation's struggle against injustice suggests that unless people remain steadfast in their determination to act affirmatively to correct past wrongs, the policy will be abandoned while the person who has been hobbled by chains is still far behind in the race."

Mr. HAYES. Thank you. Mr. Taylor.

STATEMENT OF WILLIAM L. TAYLOR, EXECUTIVE DIRECTOR, CITIZENS' COMMISSION ON CIVIL RIGHTS

Mr. TAYLOR. Mr. Chairman, I'd just like to add a few words to what Dr. Flemming and others have said this morning about why, in the light of the work done by the Citizens' Commission and other studies, the administration's proposal to rescind Executive Order 11246 is an unconscionable assault on civil rights progress.

There's been some question raised this morning, but what the order would do is clear. It would rescind the use of goals and timetables, at least as a requirement that Government contractors must meet; and it would eliminate the use of statistical evidence as a tool in determining civil rights compliance.

Now it's wrong for several reasons. One is that the administration's proposal deliberately ignores the experience with persistent discrimination that gave rise to goals and timetables and the use of statistical evidence in the first place. I was in the Government in the 1960's after affirmative action had been made a part of the Kennedy order, and can attest, along with others, that the reason we got the goals and timetables was that hortatory methods of inducing employers to adopt inclusionary practices simply did not work in the case of many employers, and something more had to be done.

The experience we had at that time also showed that voluntarism did not work. Some may member—you may remember, Mr. Chairman, something called plans for progress. That was adopted during the Kennedy administration, and was intended to rely on voluntary means. What was found was that the plans for progress employers did worse than those who weren't Government contractors at all.

Employers reasonably want rules that will apply equally to all. The current administration proposal which would bar goals and timetables as a remedy but reportedly leave some scope for voluntary action will leave employers in a highly untenable position, subject to suits from both sides with the Government apparently weighing in on the side of white employees who object to the use of affirmative action.

As to statistical evidence, it's been used by the courts as a gauge of discrimination for more than 50 years, and it's become increasingly important as racial policies have become less overt and blatant. It's used in many areas of the law.

Judge Brown really said it in a case called *Alabama* v. *United States* in which he said, in the problem of racial discrimination, statistics tell much and the courts listen. Everybody, from the ordinary citizen to the theoretical scientists, knows that statistics are important in getting at the truth and the heart of a matter, and yet this administration would censor the use of such statistics, first, in employment, then I would predict, in other areas of the law as well.

Now not only does the administration ignore the experience that gave rise to the use of goals and timetables and statistical evidence, but it ignores the experience that has occurred over the past 15

years with these tools for compliance. Dr. Flemming cited the three key findings.

Affirmative action remedies have led to statistical improvements. There's significant improvements in the occupational status of minorities and women. It has wide support in the business community and has improved personnel practices and been of benefit to the business community; and in many companies, affirmative action has resulted in benefits to the work force as a whole, the fairer procedures, getting rid of old boy networks and nepotistic practices.

I would only add to that that those were conclusions that were reached on the basis of surveys of business people, consultation with business leaders, and what they said is pretty much what you heard Mr. McEwen say this morning, out of their own experience, it's a policy that works.

Finally, it should be clear that the administration's initiative is in response not to any clear set of needs except a set of ideological needs. Affirmative, as many have said, is not a quota policy. It—the regulation specifically disavows the use of quotas. And as your question, Mr. Hayes, brought out this morning, there's no evidence that has yet been cited about the existence of abuse. If it were, then obviously it could be dealt with by means short of rescinding the Executive order.

The administration just seems actuated by a belief that Government has no important role to play in assuring fairness and equity to its citizens, even when the citizens' tax dollars are involved. The policy seems to be, if it ain't broke, break it.

The results of the administration's initiative will clearly be to stem progress that has been made and to reopen wounds that have been healed.

Now I should say, I know there's a lot of gloom around this town about the inevitability of what the administration seems to do; and of course, as Dr. Flemming and Ms. Simmons have said, Congress has recourse. But listening to members of the subcommittee this morning and listening to others, I would hope we will all make an effort to use whatever persuasive influence we all have to get the administration to come to its senses and deflect from this completely wrong headed course.

Thank you very much, Mr. Chairman.

Mr. HAYES. Thank you.

Let me say that we have some rigid time constraints. As a matter of fact, we have to vacate this room by 1 p.m., and there's another panel yet to be heard. I am, therefore, going to limit any questions that I may raise to maybe one or two, and I hope your responses are as brief as possible.

Ms. Simmons, you read the first and second draft proposals of the Executive order. You read what they purport to do. Can you tell me whether it is logically consistent to eliminate the legal basis for statistics, goals and timetables while allowing their use to be voluntary?

Ms. SIMMONS. No, sir; it is not.

Mr. HAYES. It is not. How could we then monitor discrimination?

Ms. SIMMONS. Mr. Chairman, you could not.

Mr. HAYES. Now, Dr. Flemming, why is the proposed repeal of the Executive order provision dealing with the use of statistics,

goals and timetables so important an issue today? Why is it so important? You heard the——

Mr. FLEMMING. You mean, why is their proposal——

Mr. HAYES [continuing]. Why is the proposed repeal of the Executive order so important today to this administration?

Mr. FLEMMING [continuing]. Well, let me say this, that I feel that over a period of the last 4 to 5 years they have made very clear their opposition to the development and implementation of effective affirmative action plans in the field of employment.

The fact of the matter is, they signaled what they were going to do in the Republican policy platform of 1980, and they signaled it so clearly that I made up my mind as a lifelong Republican that I could not support them, because of the position that they were taking on that and other civil rights issues.

They have proceeded to pursue the objectives set forth in that policy platform down through the years; and clearly, if they want to undermine the most effective method we have for opening up employment opportunities for the victims of discrimination, the thing to do is to gut this Executive order, which has evolved over a period of years.

Consequently, if they do gut it, then I would simply have to conclude that they were following up the objective that they set some years ago.

Now I agree with Mr. Taylor. I think we should keep the heat on the executive branch, try to bring them to their senses, try to make them realize the seriousness of what they're doing. But if that doesn't work—and I'm not too optimistic, obviously, in the light of my comments—If that doesn't work, then I think there should be an immediate response on the part of the Congress, because I believe there's strong grassroot support for everything that this Executive order stands for. I think then we've got to turn to the elected representatives of the people and say, look, take the heart of this and put it into law so that in no uncertain terms the Congress of the United States says, we are not going to move backward; we're going to move forward in this area.

Mr. HAYES. Ms. Greenberger, are you suggesting in your testimony that the proposal to amend Executive Order 11246 would be unconstitutional, since it prohibits the use of effective measures to prove and as a remedy for discrimination?

Ms. GREENBERGER. Yes, sir; and I think that that's the case. I think that—and the testimony refers to a series of cases that support this principle that government is not supposed to support discrimination. The Government itself may not discriminate. The Constitution prohibits that. It also prohibits the Government from supporting others that discriminate, and it prohibited the Government from supporting those discriminators by giving them Federal funds.

What we have is a reflection of that very principle in the Executive order. Government contract funds which employers seek from the Government which can be very lucrative may not be given to employers who discriminate, who exclude many of our citizens from their work forces.

It is a matter of public policy, but it is also a matter, I think, of constitutional principles as well.

Mr. HAYES. I want to thank each of you very much for your testimony and, in its entirety, will be made a part of the record. If any of us have any specific questions that we did not get a chance to raise at the hearing, if we submit it to you in writing, I hope we can get a response from you. Thank you very much.

Now the final panel, panel III, William Robinson, executive director—Rich Seymour—you are representing the employment discrimination project, Lawyers Committee on Civil Rights? All right. And Nancy Kreiter, executive director of Women Employed Institute. I understand you're from Chicago. Is that right?

Ms. KREITER. Sure am.

Mr. HAYES. That's my kind of town. And Claudia Withers, staff attorney, Women's Legal Defense Fund.

So that I won't be accused of sex discrimination, I'm going to hold you until last. I want to hear Ms. Kreiter.

STATEMENT OF NANCY KREITER, RESEARCH DIRECTOR, WOMEN EMPLOYED INSTITUTE

Ms. KREITER. My name is Nancy Kreiter, and I'm the research director for Women Employed. I'd like to thank you for inviting us to testify concerning the OFCCP's enforcement record at this critical time in its history.

In the interest of time, I will delete from my oral testimony the bulk of Women Employed's views on goals and timetables and the tampering with the Executive order. Let me just make some brief points that have not been addressed yet.

The Contract Compliance Program is a program to provide equal employment opportunity for qualified workers. It is not a program which forces employers to hire, promote or train unqualified female or minority workers in order to meet rigid hiring quotas. A goal is, in fact, an estimate of the number of qualified persons who are available and could be reasonably expected to be employed absent discrimination.

The estimate is made by the employer, subject to review by the OFCCP, and its test is that it be reasonable, attainable and nondiscriminatory. No contractor has ever been subject to sanctions because a goal was not reached.

In fact, the use of goals and timetables for the purpose of remedying underutilization in a work force is no different from any other measurement tool used by a business, whether it be production goals, quality standards, strategic planning, what have you.

The reason I feel it is important to make that point is there's a lot of confusion, especially within this administration, that the Contract Compliance Program is supposed to bring about requisite skills, training, for the disadvantaged in this country. We applaud any goal that would embrace training for the disadvantaged, but the Contract Compliance Program was never meant to take on that mandate. It is talking about equal opportunity for already qualified prospective employees.

Even if the battle to retain the use of goals and timetables is won, the Executive order and its implementing regulations would remain in jeopardy. Under the Carter administration, the OFCCP published new comprehensive regulations with an effective date of

January 29, 1981. On January 28, 1981 the Reagan administration in an unprecedented tampering with rulemaking procedures suspended the effective date of the regulations indefinitely.

In August 1981 and April 1982 the administration published their proposed regulations which would dismantle enforcement and exempt a majority of contractors from affirmative action requirements. The proposal stirred major controversy both within and outside the Government; and because of the outcry, the proposals have never been officially implemented.

Instead, we have had de facto implementation of many of the proposed regulations through podium policy and the issuance of internal policy directives by the national office.

Despite repeated protests from the EEOC and from women's and civil rights organizations, OFCCP field offices have been ordered to continue following these policy directives in all Compliance reviews and enforcement proceedings. An example: In a letter dated April 19, 1983, EEOC Chair Thomas chided the OFCCP for issuance of a March 10, 1983 directive entitled "Interim Description of Required Ingredients of Discrimination Cases."

Thomas took issue with OFCCP's abandonment of formula relief, as well as the agency's incorrect interpretation of prima facie statistical discrimination in the case *United States* v. *Hazelwood School District.* He asked that the directive be withdrawn for correction and coordination with the EEOC.

Women Employed also took issue with the March 10, 1983 directive, and was assured by then Under Secretary of Labor John Collyer that the directive would be withdrawn. The Under Secretary also promised that the directive system would no longer be used to promulgate policy changes that differed from the governing regulation. To date, the directive has not been withdrawn, and the practice of changing policy through directives is still firmly in place.

In fact, through implementation of the March 10 directive and others, the OFCCP has abandoned formula relief; abandoned the analysis of statistical discrepancies in determining discrimination; has established a 2-year justiciability period for investigating acts of discrimination; has changed complaint procedures to allow contractors to know the identity of class members in a third party class charge; has signed secret agreements with four corporations which allow for the filing of multiyear affirmative action plans, abbreviated compliance reviews, and availability analysis which considers a limited number of factors.

All of these policies were contained in the administration's proposed regulations. Their adoption shows a blatant disregard for due process and violates legal rulemaking procedures.

During the Reagan administration Women Employed was forced to file suit in Federal district court to require the OFCCP to turn over data on its performance record, data that was routinely available to organizations such as ours during all previous administrations.

The data Women Employed now receives because of our suit is limited in scope and received long after the Freedom of Information Act requests have been filed, and then only after repeated written, verbal and legal threats.

The performance data we have obtained shows how drastic the decline in the agency's enforcement has been. In the last year of the Carter administration a total of $9.3 million was awarded to over 4,300 women and minorities who had been discriminated against. In the first half of fiscal year 1985 the total was down to $1.1 million to all of 211 victims of discrimination.

Of particular importance is the investigation of affected classes of women and minorities who suffer from the effects of past discriminatory treatment. Essentially, affected class analysis is the key to attacking systemic discrimination by Federal contractors. In fiscal year 1980, 391 affected class cases were being handled. Currently, OFCCP does not even track affected class cases.

Mr. HAYES. Ms. Kreiter, I hate to interrupt you, but if you could conclude.

Ms. KREITER. OK. Let me quickly summarize, and I feel it's important since Ms. Meisinger failed to cite many of their statistics and selectively chose.

The administrative complaints, the first step before you take a contractor to formal debarment, is down from over 50 to under 10 under the Reagan administration. We've heard their defense, that they're getting more reviews done and more complaints than ever. We can document that those reviews are quantity and not quality reviews, and that's why the numbers are up on that.

Looking at region V, which is the Chicago region and the largest number of contractors responsible for one-quarter of all Federal contractors, again drastic reduction. Region V had the most outstanding record in the program consistently up until the Reagan administration. They have fallen in number of reviews completed, number of conciliations, amount of back pay and how many victims they treat.

Let me conclude by saying it's our belief that the current crisis in the contract compliance program must be overcome. Despite the administration's misrepresentations of equal opportunity enforcement programs, there continues to be strong public support for ending discrimination.

It has been documented that affirmative action is effective in opening up opportunities to those who were previously excluded.

We urge the members of this subcommittee to do everything possible to prevent the destruction of the Executive order program. Women employed will continue to work with all those who are committed to true equal opportunity to ensure that this program is preserved.

Thank you.

[The prepared statement of Nancy Kreiter follows:]

Prepared Statement of Nancy Kreiter, Research Director, Women Employed Institute

My name is Nancy Kreiter; I am the Research Director for Women Employed. Over the past twelve years, Women Employed has closely monitored the performance of equal opportunity enforcement agencies, including the Office of Federal Contract Compliance Programs. Our advocacy program includes a Job Problems Counseling Service for women with discrimination complaints, development of cases that come in through this service, monitoring agency performance in handling cases, and development of specific, detailed proposals for improving enforcement efforts. In addition, the organization compiles statistical analyses to measure government agency enforcement performance.

We would like to thank the subcommittee for inviting us to testify today concerning the OFCCP's enforcement record at this critical time in its history. The Department of Labor's Office of Federal Contract Compliance Programs is now facing a threat to the very essence of its mandate to protect women and minorities from job discrimination by federal contractors. That threat is in the form of a proposed Executive Order that would set back the cause of civil rights and could put an end to the slow but steady progress that women and minorities have achieved since the original Executive Order was issued in 1965.

The requirement of Executive Order 11246 that government contractors provide equal job opportunity without regard to race, religion, color or national origin has been established federal policy for the last forty-four years without interruption. This same obligation with respect to sex has been

enforced for the last eighteen years. Collectively, these equal employment opportunity requirements have been supported by eight successive Presidents.

The concept of affirmative action was adopted in the 1960's when it became clear that the federal government's policy of "passive nondiscrimination" was not sufficient to provide equal opportunity. Since that time, affirmative action has evolved into a fair and equitable policy with bipartisan political support and with the help of private industry. The affirmative action clause was written into Executive Order 11246, issued by President Johnson and retained by Presidents Nixon, Ford, and Carter.

POLICY

In an overt move to nullify the effectiveness of Executive Order 1124b, the Reagan administration is now considering a revised order which would completely delete current requirements that federal contractors set numerical hiring and promotion goals to remedy the effects of past discrimination. The proposed Executive Order is part of the Reagan administration's all-out attack on affirmative action policies which administration officials believe to be discriminatory toward white males.

We strongly oppose the replacement of Executive Order 11246 with the revised order for two equally important reasons.

First, affirmative action programs under Executive Order 11246 have been responsible for significantly increasing the employment opportunities of women

and minorities in jobs from which they have historically been excluded. The correlation between enforcement by the OFCCP and gains for women and minorities has been documented in three studies completed over the past two years: an internal OFCCP study, a study completed under contract with the U.S. Department of Labor by Jonathan Leonard, and one completed by the Potomac Institute. Women Employed's own research shows that the decade of the 1970's and the early 1980's were marked by substantial achievements for women in hiring, training and promotions -- achievements which can be tied, in part, to pressure created by the enforcement of equal opportunity laws and regulations by the federal government. The greatest gains were made in the officials and managers job category, where women's participation increased from 16.6 percent to 41.6 percent between 1970 and 1984. Gains were also made in women's representation in professional and technical jobs -- from 40 percent in 1970 to 48.4 percent in 1984; in sales positions -- from 39.4 percent to 47.0 percent. Even in skilled craft positions, women increased their representation from 4.9 percent in 1970 to 8.5 percent in 1984. In fact, some of the most impressive increases in women's participation were achieved in specific industries and occupations which weretargeted for enforcement by the OFCCP. Women won millions of dollars in legal settlements and broke many barriers, entering occupations previously closed to them. For example, the suit filed by the Women's Equity Action League (WEAL) in 1974 forced the OFCCP to focus on higher education institutions with the following results: In 1970, 28.3 percent of all university and college teachers were women; by 1984 women's participation had reached 36.6 percent. The banking industry was

targeted for enforcement actions by the OFCCP during the Carter administration. Women's representation as bank officers and managers increased from 17.6 percent in 1970 to 41.7 percent in 1984. One of the most dramatic improvements took place in the field of sales after the OFCCP targeted the insurance industry. Overall statistics for the sales agent category show that the percentage of saleswomen increased from a mere 7.2 percent in 1970 to 38.4 percent in 1984.

The enforcement efforts by the OFCCP were successful because numerical goals and timetables made it possible for the agency to statistically measure a contractor's good faith effort to correct underutilization of women and minorities in its workforce. Without the ability to quantitatively measure the success or failure of a contractor's efforts and require corrective measures, the contract compliance program will no longer function as an effective weapon against job discrimination.

Second, we believe that the Reagan administration's main argument against the use of affirmative action goals and timetables is fundamentally flawed. Those in favor of a new executive order argue that the existing rules have encouraged employers to discriminate against white men. This argument distorts the actual requirements of the program as currently authorized. The OFCCP's affirmative action requirements for federal contractors consist essentially of three elements. The first element is a survey of the workforce by the contractor to discover whether there is any underutilization of women and minorities. The second consists of a commitment by the contractor to

correct the underutilization, including goals and timetables by which the correction can be reasonably accomplished. The third element is a monitoring system to ensure that the program is fairly and equitably accomplishing its objectives.

The workforce survey is intended to focus specifically on those job categories and career areas from which women and minorities have traditionally been excluded, such as professional, managerial, technical, skilled trades. The size of the goals are arrived at through estimates of anticipated vacancies, and the availablility of persons with the requisite skills and abilities. These goals can be reached through good faith efforts at recruitment, outreach, training and other positive personnel practices. This is a program put in place to provide equal employment opportunity for qualified workers. It is not a program which forces employers to hire, promote, or train unqualified female or minority workers in order to meet rigid hiring quotas. Affirmative action goals under Executive Order 11246 create no set-asides or otherwise reserve a specific number of positions for any particular group. A goal is, in fact, an estimate of the number of qualified persons who are available and could be reasonably expected to be employed absent discrimination. The estimate is made by the employer and is subject to review by the OFCCP, and its test is that it be reasonable, attainable and nondiscriminatory. Progress toward the goal is a measure of the employer's success in eliminating the discriminatory exclusion of minorities and women. In fact, the use of goals and timetables for the purpose of remedying underutilization of women and minorities in a workforce is no different from

any other measurement tool used by a business, whether it be production goals, quality standards, or in strategic planning. And an employer's compliance with affirmative action requirements is not determined solely on the basis of whether it has achieved its goal. The test is whether or not it has demonstrated a good faith effort to do so. No contractor has ever been subject to sanctions because a goal was not reached. Most importantly, the contract compliance program never requires an employer to hire or promote a less qualified minority or woman over a more qualified white male.

Because the goals and timetables required under Executive Order 11246 have been instrumental in helping to overcome economic injustice, and because they do not impinge on the legitimate job rights of other members of the workforce, it is essential that these affirmative action requirements be continued until the remaining vestiges of employment discrimination have been eliminated.

Yet, even if the battle to retain the use of goals and timetables as a tool for achieving equal employment opportunity is won, the Executive Order and its implementing regulations remain in jeopardy. Under the Carter administration, the OFCCP published new comprehensive regulations with an effective date of January 29, 1981. These regulations were the result of a four-year effort to strengthen and streamline affirmative action requirements. However, on January 28, 1981, the Reagan administration, in an unprecedented tampering with rule-making procedures, suspended the effective date of the regulations indefinitely. In August 1981, and April 1982, the Reagan administration

published proposed new affirmative action regulations which would virtually dismantle enforcement and exempt the majority of contractors from affirmative action requirements. These proposals stirred major controversy both within and outside government. The proposals were strongly criticized at hearings held by this subcommittee, and over 1500 comments from women's civil rights, labor, community, and business organizations were received. Because of the outcry, the proposals have never been officially implemented. Instead, we have had de facto implementation of many of the proposed regulations through so-called "podium policy" and the issuance of internal policy directives by the national office.

Despite repeated protests from the Equal Employment Opportunity Commission (EEOC), the lead agency in federal equal opportunity matters, and from women's and civil rights organizations, OFCCP field offices have been ordered to continue following these policy directives in all enforcement proceedings. For example, in a letter dated April 19, 1983, EEOC Chair Clarence Thomas chided the OFCCP for issuance of a March 10, 1983 directive entitled "Interim Description of Required Ingredients of Discrimination Cases". Thomas took issue with OFCCP's abandonment of formula relief, as well as the agency's incorrect interpretation of prima facie statistical discrimination in the case U.S. v. Hazelwood School District, 433 U.S. 299 (1977). He asked that the directive be withdrawn for correction and coordination with the EEOC. Women Employed also took issue with the March 10, 1983 directive and was assured by Undersecretary of Labor Collyer that the directive would be withdrawn. The undersecretary also stated that the directive system would no longer be used to promulgate policy changes that differed from the governing regulations.

To date, the March 10, 1983 directive has not been withdrawn, and the practice of changing policy through directives is still in place. In fact, through implementation of the March 10 directive and other directives, the OFCCP has abandoned formula relief; has abandoned the analysis of statistical discrepancies in determining discrimination; has established a two-year justiciability period for investigating acts of discrimination; has changed complaint procedures to allow contractors to know the identity of class members in third-party class charges; has signed secret agreements with four corporations which allow for the filing of multi-year Affirmative Action Plans, abbreviated compliance reviews, and availablility analysis which considers a limited number of factors. All of these policies are contained in the administration's proposed regulations. Their adoption through directive shows a blatant disregard for due process and violates legal rule-making procedures.

Thus, under the Reagan administration, the Department of Labor's Office of Federal Contract Compliance Programs has deliberately engaged in actions and policies designed to undermine equal opportunity requirements for federal contractors. They have attempted to work in secret, behind the closed doors of the government bureaucracy and have refused to voluntarily disclose critical data on their performance. During the Reagan administration, Women Employed was forced to file suit in federal district court to require the OFCCP to turn over data on its performance record -- data that was routinely available to organizations such as ours during all previous administrations. The data Women Employed now receives because of the suit [Women Employed v. U.S. Department of Labor (Civil Action 82-831)] is limited in scope and

received long after Freedom of Information Act requests have been filed, and then only after repeated written and verbal requests. Often, we have had to threaten further legal action against the agency to get the performance statistics we request.

PERFORMANCE

The performance data we have obtained from the OFCCP shows how drastic the decline in the agency's enforcement has been. For example, in the last year of the Carter administration, a total of $9.3 million was awarded to over 4300 women and minorities who had been discriminated against. In the first half of fiscal year 1985 the total was down to $1.1 million to 211 victims of discrimination.

Of particular importance is the investigation of affected classes of women and minorities who suffer from the effects of past discriminatory treatment. Essentially, affected class analysis is the key to attacking systemic discrimination by federal contractors. In fiscal year 1980, 391 affected class cases were being handled. Currently, OFCCP does not even track affected class cases.

The statistics show that the number of administrative complaints issued when conciliation fails has also declined dramatically. In fiscal year 1980, the last full year of the Carter administration, 53 administrative complaints were filed. During the first half of fiscal year 1985, the Reagan administration issued only 9 administrative complaints.

Only two contractors have been debarred since Reagan took office, and one of the two cases was initiated, investigated and developed wholly by the previous administration.

In defense of their performance, Department of Labor officials point to the greater number of completed compliance reviews compared to the previous administration, and to their handling of complaints of discrimination filed by individuals. But there is an enormous difference between dealing with individual complaints -- it's very simple when over one-third are administratively closed with no investigation -- and ensuring that individuals' rights to equal opportunity are protected.

It's simple to produce impressive performance statistics on numbers of completed cases if management's emphasis is solely on improving those statistics. Management currently insists that investigators spend limited hours on each case and meet deadlines that are incompatible with conducting thorough investigations. In fact, rigid adherence to program plans for the number of hours to be spent on compliance reviews regardless of the nature and extent of violations uncovered has allowed OFCCP to complete a greater number of reviews while finding the same percentage of violations found in the past administration. Under Reagan, we have more compliance reviews than ever before, the same rate of violations, yet drastically fewer sanctions applied or remedies awarded to victims of discrimination. Enforcement performance must be judged by end results.

An examination of Region V's recent enforcement performance provides a striking study of the sharp decline in enforcement since Reagan appointees took over the OFCCP. Region V, headquartered in Chicago, is responsible for monitoring 25 percent of all federal contractors. For years, Region V had consistently made the greatest contribution among the ten regions to the agency's overall enforcement record. In fiscal year 1981, for example, Region V was responsible for approximately 28 percent of all completed reviews, two-thirds of the administrative complaints filed, and nearly 35 percent of the back pay awarded.

Region V's performance since that time has fallen substantially. Today, the region is responsible for 19 percent of all compliance reviews completed, only 15.6 percent of all conciliations, and a mere 8.6 percent of the back pay awarded to 3 percent of the victims remedied.

CONCLUSION

It is our belief that the current crisis in the contract compliance program must be overcome. The program is vitally important to continued progress in the fight to end employment discrimination against women and minorities in this country. The following elements are essential to an effective program: 1) The existing Executive Order 11246 must remain in place, and it must be backed by regulations which provide for utilization analysis, goals and timetables based on comprehensive availability analysis of qualified women and minorities, analysis of classes of women and minorities suffering the effects of past discrimination, formula relief for victims of systemic discrimination, make-whole back pay and front pay relief.

2) We need serious enforcement of Executive Order 11246 that is measured by the quality of compliance reviews as well as the number performed and the strength of sanctions against contractors that fail to comply.
3) The OFCCP must remove the shroud of secrecy and suspicion surrounding the contract compliance program. Increased public accountability is needed to improve the agency's relationship with constituency groups. The agency should release all performance statistics and information on a timely basis. Regular formal and informal communication between the agency and constituency groups, as well as contractors, must be implemented.

We firmly believe that affirmative action is still necessary to continue to make headway against discrimination that makes women and minorities second-class citizens in the job market. Despite this administration's misrepresentations of equal opportunity enforcement programs, there continues to be strong public support for ending discrimination and continuing programs to do so. It has been documented that affirmative action is effective in opening up opportunities to those who were previously excluded. Employers who embraced this concept have hired from the largest pool of talent available because they do not systematically exclude on the basis of race or sex. They will tell you that their businesses benefit from their commitment to affirmative action. We urge the members of this subcommittee to do everything possible to prevent the destruction of the Executive Order program. We will continue to work with all those who are committed to true equal opportunity to ensure that this program is preserved.

Women Employed Institute 5 South Wabash, Suite 415 Chicago, Illinois 60603 (312)782 3902

SUMMARY OF OFCCP ENFORCEMENT ACTIVITY

FY Comparisons: FY 1980-FY 1985*

	FY 1980	FY 1981	FY 1982	FY 1983	FY 1984	FY 1985*
Compliance Reviews Completed	2,627	3,135	3,081	4,309	5,025	2,587
Affected Class Cases Completed	391	346	213	N.A.	N.A.	N.A.
Conciliation Agreements	743	1,038	696	816	1,164	570
Administrative Complaints Filed	53	15	5	18	25	9
Back Pay Awarded	$9,253,861	$5,095,497	$2,132,000	$3,559,000	$2,656,384	$1,112,266
# Persons	4,336	4,754	1,133	1,748	496	211

OFCCP DEBARMENTS

Total	1965-1976	Carter Administration	Reagan Administration
28	13	13	2

* First half only

Source: Women Employed Institute from OFCCP Quarterly Review and Analysis Reports

Mr. HAYES. Thank you very much. Ms. Withers.

STATEMENT OF CLAUDIA WITHERS, STAFF ATTORNEY, WOMEN'S LEGAL DEFENSE FUND

Ms. WITHERS. Thank you, Mr. Hayes.

My name is Claudia Withers, and I'm a staff attorney at the Women's Legal Defense Fund.

The Women's Legal Defense Fund appreciates this opportunity to comment very briefly on the Executive Order Program and how it's currently being administered. Other witnesses have already indicated that there are studies extant which show that the Executive Order Program has been effective in improving the equal employment opportunity of minority males and women. So I'll just go to a brief comment about how the program is currently being administered.

In the years since 1981 there has been a major shift in emphasis by the Office of Federal Contract Compliance Programs from a spirit of tough enforcement to one which is an effort to reduce the agency's purported adversarial stance. The overall result has been an agency that is apparently less concerned with achieving equal employment opportunity for women and minority males and more concerned with lessening the burdens on Federal contractors.

As its first step upon assuming control of OFCCP, the present administration suspended implementation of revisions which Ms. Kreiter has already talked about. They substituted those revisions with their own proposed revisions. Amongst the proposals were to relieve approximately 75 percent of presently covered Federal contractors from the requirement of producing written affirmative action plans.

Other cutback measures were proposed. For example, contractors with long-term affirmative action plans were to receive 5 year exemptions; compliance reviews prior to the award of large contracts were to be eliminated; employment goals for women in construction were to be established on an aggregate basis rather than on a craft basis.

The proposed regulations were criticized by both the civil rights community and by business. In addition, there are criticisms by the EEOC and the U.S. Commission on Civil Rights. To date, as Ms. Kreiter has stated, these proposed regulations have neither been finalized nor replaced.

However, the fact that the regulations have not been finalized has not prevented the OFCCP from using podium policy. They significantly reduced the impact of the program by the use of internal directives and all instructions to regional offices. They have narrowed their standards of eligibility for back pay, and they've limited the period of harm for which back pay will be sought.

They have also made it more difficult to prove patterns and practices of discrimination by statistical evidence. More recently, OFCCP has instituted the national self-monitoring reporting system. Under the NSMRS Program, the acronym, large multifacility contractors are permitted to monitor their own affirmative action performances with little or no oversight by the OFCCP.

We have indicated on other occasions our concerns about the NSMRS Program. Last summer, before this subcommittee, the OFCCP officials and other officials testified that the NSMRS Program was merely a resource management tool, and that the OFCCP has clear authority to implement the program.

We continue to be concerned, however, that the NSMRS Program is being implemented without even the release of a directive for its implementation, as was promised by Ms. Meisinger over a year ago.

Confusion, therefore, about the program continues; and with it, confusion about overall enforcement at OFCCP.

Finally, I want to make it clear that, notwithstanding my brief summary of our legitimate concern about the current enforcement of the Executive order, we, the Women's Legal Defense Fund, oppose any attempts to revise the Executive order itself. The Contract Compliance Program vigorously enforced and effectively targeted has brought about positive changes in the employment status of women and minority men. It's obvious that much remains to be done.

We believe that the OFCCP should vigorously enforce the Contract Compliance Program in order to achieve equal employment opportunity. We look forward to working with Mr. Cooper and the other members of the OFCCP in order to see that this is accomplished.

[The prepared statement of Claudia Withers follows:]

Prepared Statement of Claudia Withers on Behalf of the Women's Legal Defense Fund

Chairman Martinez and members of the Subcommittee, my name is Claudia Withers, and I am a staff attorney at the Women's Legal Defense Fund.

The Women's Legal Defense Fund is a private, non-profit organization founded in 1971 in Washington, D.C., by a group of feminist attorneys. WLDF maintains as a primary goal the elimination of discrimination on the basis of sex. Among the activities pursued by WLDF are counseling and representing individual women with employment discrimination problems. In addition, during the past seven years, WLDF, along with Women Employed of Chicago, also represented at this hearing, has been involved in the monitoring of the performance of federal agencies charged with the enforcement of equal employment opportunity laws.

We appreciate this opportunity to comment on the employment status of women, on Executive Order 11246, as amended, on its history, and on how the Executive Order program is currently being administered. We understand that other witnesses will discuss in detail the legality of the present Executive Order program, as well as recent attempts to gut the program.

Women's Employment Status

Working women have achieved some major gains in the last several years. The 1970's was a decade of access, when the vigorous enforcement of EEO laws resulted in the opening of new opportunities. Notwithstanding these successes for women workers, the overall economic status of women has improved very little.

Women accounted for more than three-fifths of the increase in the civilian labor force in the past decade -- about 13.7 million women compared with 8.4 million men. Women accounted for nearly 44 percent of all persons in the civilian labor force in 1983. Nearly half (49 percent) of all black workers were women; 43 percent of all white workers were women; and 40 percent of all Hispanic workers were women.

Women workers have achieved some progress. One of the important shifts that occurred between 1960 and 1970 was the influx of women into the skilled trades. The Department of Labor notes that by 1981 there were more than 802,000 women employed in the skilled trades, more than double the number in 1970 and almost four times the number in 1960. Altogether, however, women still hold less than one of every five skilled jobs. Women have also made gains in other predominantly male professions, such as law. From 1972 to 1981, women more than tripled their proportion of all employed lawyers from 4 to 14 percent. The number of women physicians nearly doubled. Women in engineering increased from about 9,000 to about 68,000 between 1972 and 1981, an 800 percent increase, compared with a 33 percent growth rate for men. The category of bank officers and financial managers was the fastest growing managerial occupation for women. By 1981 women made up about 38 percent of all workers employed as bank officers and financial managers.[1/]

It is necessary, however, to put these figures into perspective. Notwithstanding the inroads of women into occupations

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[1/] "Time of Change: 1983 Handbook on Women Workers," U.S. Department of Labor, Women's Bureau, Bulletin 298, 1983.

formerly closed to them, clerical work is still the single largest occupational group for women. Service occupations make up the second largest sector of women's employment. In 1983, they were 80 percent of all administrative support (including clerical) workers but only eight percent of precision production, craft, and repair workers; and 70 percent of retail and personal sales workers but only 32 percent of managers, administrators, and executives.[2/] Women still earn about 65 cents for every dollar earned by the average man. Black women earn about 59 cents for every dollar earned by a man; Hispanic women earn about 55 cents.[3/]

The over-representation of women -- and especially of women of color -- among the very poor is another reflection of the fact that the few positive changes that have occurred simply do not go deeply enough. Women represented 61 percent of all persons aged 16 and over who had incomes below the poverty level in 1983. The proportion of poor families maintained by women was 47 percent in 1983. The proportion of poor families maintained by women was 47 percent in 1983, up from 43 percent. Nearly 72 percent of black families with incomes below the poverty level were headed by women. Forty-six percent of Hispanic families, and 37 percent of white families were in similar situations.[4/] These figures illustrate that affirmative action is needed to help women achieve economic equity.

[2/] "20 Facts on Women Workers," U.S. Department of Labor, Women's Bureau, 1984.

[3/] Employment and Earnings, U.S. Department of Labor, Bureau of Labor Statistics, January, 1985.

[4/] "20 Facts on Women Workers," U.S. Department of Labor, Women's Bureau, 1984.

These figures also illustrate that women of color in particular are in real need of affirmative action. They suffer from the burden of double discrimination, that is, discrimination based on sex and race or national origin. Women of color are more likely to be crowded into female dominated occupations and are less likely to be represented among those traditionally male occupations into which women in general have made some inroads, such as the skilled trades or managerial positions. It is clear that for these women, current affirmative action efforts are not enough, but need to be redoubled in order that they too will be able to achieve equal employment opportunity.

The progress achieved to date by women in the workplace has been due in large part to the enforcement of Title VII of the Civil Rights Act of 1964[5/] by the Equal Employment Opportunity Commission and private parties, and to enforcement of Executive Order 11246, as amended, by the Department of Labor's Office of Federal Contract Compliance Programs.

The Executive Order Program

Executive Order 11246, as amended, prohibits discrimination in employment by federal contractors and further, requires them

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[5/] Title VII of the Civil Rights Act of 1964 has two purposes: (1) "to make persons whole for injuries suffered on account of unlawful employment discrimination" and (2) to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 418 (1975). Title VII, as it is interpreted by the courts and enforced by the EEOC, has been a crucial underpinning in the legal scheme that encourages and sometimes requires the continued use of affirmative action and thus has had a positive impact on the increased employment opportunities for women and minority males.

to undertake affirmative action in hiring, promotion, training and pay, for women and minority males.

The affirmative action regulations of the Executive Order provide that within 120 days of a contract award the contractor must create and adopt an affirmative action plan (AAP). Elements of the AAP include:

a. self-assessment: the contractor must look at its own employment profile of women and minorities (utilization).

b. Determination of availability: the contractor must estimate the availability of qualified women and minorities for his jobs.

c. Identification of under-utilization: the contractor must compare utilization in his own workforce with availability.

d. Establishment of the affirmative action program: the contractor must identify specific steps to take to bring utilization up to availability in the future, including setting goals and timetables to measure the success of those steps that are undertaken.[6/]

Recently completed studies indicate that enforcement of Executive Order 11246 has been very successful in increasing the presence of minority males and women in federal contractors' workforces. In 1981 the OFCCP commissioned a study entitled "Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980: A Report of the Office of Federal Contract Compliance Programs" (the "OFCCP study"). The study was released by OFCCP in June of 1984, after Congressman Hawkins questioned during an oversight hearing why the findings had not been made public. Also useful is a study entitled "The Impact of Affirmative Action" by Professor Jonathon Leonard of the School of Business Administration of the University of California at Berkeley (the "Leonard study"). This study was completed

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[6/] 41 CFR Part 60-2 (1978).

in 1983. The major premise of the OFCCP study was that "federal contractor establishments as a group should, over a period of time show greater changes in...participation rates."[7/] "Participation rates" as used in the OFCCP study means the proportion of women or minorities in a particular occupational category. The study conducted by Jonathon Leonard also compares the status of women and minorities in contractor and noncontractor establishments.

Both Leonard and the OFCCP looked at the performance data of contractor establishments during the period 1974 through 1980. As the OFCCP study notes, this period was chosen because it utilized the most reliable current data (1980 EEO-1 reports) and coincided with the implementation of the requirement of written affirmative action plans, which began in 1971, and the implementation of compliance activity regarding equal employment opportunity for women, which began in 1972.

Both studies conclude that the employment status of women and minorities has improved more in companies that are covered by the Executive Order program than those that are not covered. The OFCCP study concludes that "Executive Order establishments posted significantly greater gains in employment and advancement of women and minorities than those not covered..."[8/] Leonard finds that "[t]he federal contract compliance program has substantially improved employment opportunities for blacks,"[9/] and that contract compliance has had a positive impact on both minority and female

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[7/] OFCCP study, p. 32.

[8/] OFCCP study, p. 37.

[9/] Leonard study, p. 144.

employment between 1974 and 1980.[10/] Given the aforementioned results, it is apparent that the Executive Order program has been successful in providing equal employment opportunity for minorities and women.[11/]

For example, without the Executive Order and strong enforcement of its implementing regulations, there would be virtually no women working in the coal mines. In the coal industry, affirmative action increased the number of women miners from one percent in 1972 to 11 percent in 1979. Through affirmative action, the number of women employed in the construction industry increased nationwide by 30 percent between April 1978 and September 1979. Because of affirmative action, too, the banking industry began, albeit slowly, to change its hiring and promotion practices. In 1960, 12.2% of bank officials/financial managers were women -- only one-half percent more than there were ten years earlier in 1950. By 1970, the percentage had increased to 17.6%. By 1979, it had nearly doubled to 31.6%. By 1981, the percentage had climbed to 38%. Executive Order 11246, as amended, played a major role in the improvement in these industries; indeed, banking and coal mining had been targeted by OFCCP for stepped up enforcement efforts in the late 1970's.

[10/] Leonard study, p. 362. Neither Leonard nor OFCCP deals specifically with the progress achieved by women of color as a separate category.

[11/] Earlier OFCCP studies also found the contract compliance program to be effective. See, e.g., Orley Aschenfelter and James Heckman, "Measuring the Effect of an Antidiscrimination Program" in Orley Aschenfelter and James Blum (eds.), Evaluating the Effects of Social Programs (Princeton: Princeton University Press, 1966); Morris Goldstein and Robert S. Smith, "The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors," Industrial and Labor Relations Review (July 1976).

History of the Contract Compliance Program

The Executive Order program has evolved over a period of over forty years, and reflects a recognition by Republican and Democratic Presidents alike that the federal government must ensure that the companies with which it contracts are held to a high standard of equal employment opportunity. As the federal contract compliance program evolved, increasingly specific requirements were imposed on the contractors because experience showed that mere exhortations not to discriminate did not work.

The first executive order barring discrimination in employment by war contractors was signed by President Roosevelt in 1981.[12/] The order made no provision for actual enforcement of the equal employment requirement. Two years later, Roosevelt extended coverage of the Executive Order to cover all federal contractors or subcontractors.[13/]

Presidents Truman and Eisenhower followed with executive orders which expanded the non-discriminatory provisions. President Truman's 1945 Executive Order No. 9004 directed the Fair Employment Practices Committee established by Roosevelt to "investigate, make findings and recommendations, and report to the President with respect to discrimination in industries..." This Committee noted in its Final Report[14/] that the Executive Order Program had been beneficial for employment for minority workers. It found

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[12/] Executive Order 8802. This executive order was issued by President Roosevelt in order to forestall a planned march on Washington by blacks that was planned by A. Phillip Randolph.

[13/] Executive Order No. 9346.

[14/] Final Report of the President's Committee on Fair Employment Practices (GPO: Washington, D.C.) (1947).

further, however, that discriminatory practices were too entrenched to "...be wholly carved out by patriotism and presidential authority,"[15/] and that the advances made by minority workers diminished as soon as wartime controls were relaxed.[16/]

Because Congress denied it money for implementation, the Executive Order program stagnated from 1946 to 1951. As the Korean conflict escalated, President Truman, under authority of the war power, issued Executive Orders in February and December, 1951, requiring defense contractors to promise non-discrimination on the basis of race, creed, color or national origin.[17/]

During his first term, President Eisenhower established by Executive Order a Committee on Government Contracts composed of representatives of industry, labor and government, as well as citizens.[18/] This Executive Order reaffirmed that it was U.S. policy to promote equal employment opportunity by government contractors. President Eisenhower issued an additional Executive Order in 1954 which became the first to specify the text of the non-discrimination provision to be included in government contracts and subcontracts.[19/]

[15/] Final Report, at VI.

[16/] Final Report, at VIII.

[17/] "Affirmative Action to Open the Doors of Job Opportunity" Report of the Citizens' Commission on Civil Rights, June 1984, p. 34. [Hereinafter cited as "Report of Citizens' Commission"]

[18/] Executive Order No. 10479 (August 13, 1953).

[19/] Executive Order No. 10557 (September 3, 1954).

Although there were few tangible increases in the employment of black workers under President Eisenhower's Executive Order program, his Committee was instrumental in promoting the concept of equal employment opportunity in a variety of ways. The Committee established the machinery necessary for the implementation of the non-discrimination provision. It publicized the program, and through negotiations with contractors, actually provided some jobs and training opportunities. The Committee urged in some situations the hiring of blacks on a limited "preferential" basis -- that is, giving preference to a black applicant where he and a white applicant were equally qualified.[20/] In its Final Report, the Committee noted that the barrier to increased minority employment was not overt discrimination. It was "...the indifference of employers to establishing a positive policy of nondiscrimination."[21/] (Emphasis in the original.)

President Kennedy issued Executive Order 10925 in 1961, establishing the President's Committee on Fair Employment Practices. The President ordered further that not only should contractors be required to pledge nondiscrimination, but that they should take affirmative action to ensure equal employment opportunity on the basis of race, creed, color or national origin. In addition to the requirement of affirmative action, the Kennedy order set out penalties for non-compliance with contractual obligations. The Attorney General of the United States, in response to a request from Vice-President Lyndon Johnson in his capacity as Chairman of the President's Committee, concluded that the provisions of the

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[20/] Report of Citizen's Commission, pp. 35-36.

[21/] Committee on Government Contracts, Pattern for Progress, Final Report to President Eisenhower (GPO: Washington, D.C. (1959/60)).

Executive Order requiring affirmative action and providing for penalties were lawful.[22/]

Executive Order 11246, issued by President Johnson, built upon the contract compliance program as envisioned and initiated by President Kennedy. This order continued the affirmative action requirement and sanctions initiated by Kennedy. President Johnson assigned responsibility for the Executive Order program to the Secretary of Labor. The Secretary of Labor then created the Office of Federal Contract Compliance (OFCC) to administer the Executive Order Program. After pressure from the National Organization for Women, President Johnson issued Executive Order 11375 in 1967, which amended Executive Order 11246 to add sex to the list of prohibited bases of discrimination.

As of 1961 federal contractors became obligated to use "affirmative action." The concept was not defined initially. In 1967 then-OFCC Director Edward C. Sylvester, Jr., attempted to do so:

> There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation.[23/]

This result-oriented approach to affirmative action received more precise definition with the establishment in 1965 of the four "special area programs" for the construction industry, in St. Louis, San Francisco, Cleveland and Philadelphia. These programs were intended to "assure minority group representation in all

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[22/] 42 Op. Atty. Gen. 97 (September 26, 1961).

[23/] Report of the Citizen's Commission, p. 41.

trades and in all phases of the work."[24/] In May 1968, the OFCC issued its first regulations describing the affirmative action obligations of non-construction contractors. For the first time, the concept of "goals and timetables" was introduced into the Executive Order Program.[25/] In 1970, President Nixon's Secretary of Labor Schultz issued Order No. 4, which described in greater detail the nature of contractors' affirmative action plans and the steps which the OFCC required and recommended for implementation of the plan.[26/] Revised Order No. 4 was issued by Secretary of Labor J.D. Hodgson in December, 1971. The revised order included women for the first time in contractors' affirmative action obligations.[27/]

In recent years, the federal contract compliance program has undergone further changes. In early 1978, President Carter announced a total reorganization of civil rights agencies.[28/] Before reorganization, the OFCC had had overall responsibility for reviewing federal contractors and enforcing Executive Order 11246, as amended, but eleven different compliance programs within each of the contracting agencies (e.g., Treasury, HEW, Defense, etc.) had the actual responsibility for monitoring specific industries. As a result of that reorganization, on October 1, 1978, the entire contract compliance program was consolidated in the Department of Labor's Office of Federal Contract Compliance Programs. The new

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[24/] "The Historical Case for Goals and Timetables," Barry L. Goldstein, New Perspectives, Summer 1984, p. 20.

[25/] 33 Fed. Reg. 7804 (May 28, 1968).

[26/] 35 Fed. Reg. 2586 (February 5, 1970).

[27/] 36 Fed. Reg. 23, 152 (December 4, 1971).

[28/] Executive Order No. 12086.

OFCCP got off to a slow start, bogged down by untrained staff inherited from other agencies and its own lack of creative enforcement approaches. By 1980, however, the agency had developed an enforcement apparatus with the potential for investigating and dealing with problems of discrimination.

Thus in FY 1980, over 4,000 persons were awarded nearly $9.3 million in back pay through increased conciliation agreements and use of sanctions. This was more than the total back pay awarded in the two years preceding consolidation. Since 1965, 27 federal contractors have been debarred from doing business with the government because they refused to comply with their Executive Order contractual obligations. Fully one-half of those debarments occurred in the years from 1977-1981.

Of particular importance was the investigation of affected classes of women and minorities who suffered from the effects of past discriminatory treatment. Essentially, affected class analysis is the key to attacking systemic discrimination by federal contractors. In FY 1980, 391 affected class cases were being handled, almost all of which were initiated after consolidation.

The OFCCP Today

In the years since 1981, there has been a major shift in emphasis by OFCCP from a spirit of tough enforcement to an effort to reduce the agency's purported "adversarial" stance. The overall result has been an agency that is less concerned with achieving equal employment opportunity for women and minorities and more concerned with lessening the "burdens" on federal contractors.

As its first step upon assuming control of OFCCP, the Reagan administration suspended implementation of revisions to the OFCCP affirmative action regulations. The revisions had been promulgated by the Carter Administration after extensive consultation with a cross-section of the agency's constituents. However, instead of issuing these regulations, Reagan OFCCP officials suspended them and proposed substantial other changes to them.[29/] They proposed to relieve approximately 75% of presently covered federal contractors from the requirement of preparing written AAPs. For the remaining contractors subject to the AAP requirements, other cut-back measures were proposed: contractors with approved long-term AAP's were to receive five-year exemptions from routine compliance reviews; compliance reviews prior to the award of large contracts were to be eliminated, although such reviews had been used to secure specific commitments for improvements from employers with poor employment records; and employment goals for women in construction were to be established on an aggregate basis rather than on a craft basis (e.g., that 6.9% of persons employed by a contractor within each craft: carpenters, bricklayers) (inter alia). The proposed regulations were criticized by both the business and the civil rights communities. The EEOC and the U.S. Commission on Civil Rights were also critical of the proposed regulations. To date these proposed regulations have been neither finalized nor replaced by other affirmative action proposals.

Failure to finalize these regulations, however, has not prevented OFCCP from altering the contract compliance program without benefit of the procedural niceties of the Administrative

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[29/] 36 Fed. Reg. 42968 (August 25, 1981); 47 Fed. Reg. 1770 (April 23, 1982).

Procedure Act. The OFCCP has significantly reduced the impact of the Executive Order program by the use of internal directives and oral instructions to regional offices.[30/] The agency has narrowed the standards for eligibility for back pay by limiting the period of harm for which back pay will be sought.[31/] It has also make it more difficult to prove patterns and practices of discrimination by statistical evidence.[32/]

More recently, the OFCCP instituted the National Self-Monitoring Reporting System (NSMRS). Under the NSMRS program, large multi-facility contractors are permitted to monitor their own affirmative action performance with little or no oversight by the OFCCP. We learned in early 1984 that agreements had been established with AT&T, IBM, Hewlett Packard, and General Motors, and that discussions were being held with a number of other companies by acting OFCCP Director Susan Meisinger.

The Women's Legal Defense Fund, Women Employed,[33/] and other civil rights groups criticized the NSMRS program on a number of grounds, including the following:

- Contractors with NSMRS agreements can be annually exempted from compliance reviews during the period of the agreement, thus providing de facto implementation of multiyear AAPS proposed in August of 1981;
- National availability data may be used for purposes of determining utilization, thus allowing a company such as General Motors in Detroit to compare their utilization of black workers to national statistics.

[30/] Report of the Citizen's Commission, p. 93.

[31/] OFCCP Order No. 760a1 (March 10, 1983).

[32/] OFCCP Order No. 160a1 (March 10, 1983).

[33/] See Women Employed, "Analysis of National Self-Monitoring Reporting System (March 1984) reprinted in Daily Labor Report, no. 70 (April 1984).

- The eight factors used in the regulations to determine availability have been collapsed to two under the NSMRS program.

We have other concerns, as well. The NSMRS program was implemented without going through internal channels within the federal government or without the benefit of public participation under the Administrative Procedure Act. The agreements were not approved by the Solicitor of Labor.[34/] The EEOC, the lead federal agency in the area of employment discrimination, was never consulted. Provisions in the agreements that ensure confidentiality to the contractors appear to violate the Freedom of Information Act.

OFCCP officials and former officials testified before this subcommittee last summer that the NSMRS program was merely a "resource management tool,"[35/] and that OFCCP has clear authority to implement the program.[36/] Constituency groups, however, continue to be concerned that the NSMRS program is being implemented without even the release of a directive for its implementation, as was promised by Susan Meisinger over a year ago. Confusion about the program continues, and with it confusion about overall enforcement at OFCCP.

[34/] When Associate Solicitor James Henry did review the agreements that had been signed, he expressed concern regarding their vulnerability to legal challenge. See Memorandum from Associate Solicitor of Labor James D. Henry to Susan D. Meisinger, reprinted in Daily Labor Report, no. 70 (April, 1984).

[35/] Testimony of Ellen Shong Bergman at OFCCP Oversight Hearings, June 27, 1984.

[36/] Testimony of Susan Meisinger at OFCCP Oversight Hearings, June 27, 1984.

Finally, we want to make it clear that notwithstanding our legitimate concerns about the current enforcement of Executive Order 11246, as amended, we oppose any attempts to revise the Executive Order itself. The contract compliance program, vigorously enforced and effectively targetted, has brought about positive changes in the employment status of women and minority men. It is obvious, however, that much remains to be done. We believe that OFCCP should vigorously enforce the contract compliance program in order to achieve the goal of equal employment opportunity. We look forward to working with Mr. Cooper and his staff in order to see that this is accomplished.

Mr. HAYES. Mr. Seymour.

STATEMENT OF RICHARD T. SEYMOUR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. SEYMOUR. Thank you, Mr. Hayes. My name is Richard Seymour. I'm testifying for the Lawyers' Committee for Civil Rights Under Law.

We have a number of basic points, and I'll address as many of them as I have a chance to.

Mr. HAYES. I know it's hard for a lawyer to do, but—you know——

Mr. SEYMOUR. That's right, sir.

Mr. HAYES [continuing]. Try, if you can.

Mr. SEYMOUR. Our greatest concern is with the effect that signing the proposed Executive order that was made available to the press in August would have. Other witnesses have adequately described the effect of the elimination of goals and timetables. I'd like to concentrate on what it would mean to bar the Labor Department from the ability to look at the actual numbers of women and members of minority groups hired and promoted.

Although the draft Executive order did not make this clear, it's effect will still be clear. The coverage of the order would be drastically narrowed. It is not possible to prove a pattern or practice of subjective discrimination without looking at the numbers of people who are hired and promoted.

In court case after court case, the courts have recognized that statistics are the only means by which patterns of subjective discrimination can be shown. That's a series of cases going back 50 years now to *Norris* v. *Alabama,* a 1935 jury discrimination case.

It would also be impossible for the Labor Department to examine a discriminatory test, a discriminatory education requirement, a discriminatory experience requirement; because in order to show that these disparate impact practices are potentially unlawful, one first has to show that they tend to exclude members of minority groups or women at a disproportionately high rate.

All that would be left of the Executive order program, because of this restriction of coverage, would be just those rare cases in which there is direct proof of intentional discrimination such as a sign in the window saying "No blacks need apply" or "No women wanted."

The draft Executive order would not directly outlaw voluntary affirmative action programs of employers, but would remove the legal protection that the Executive order program now gives to those voluntary goals and timetables.

There is a reported discussion of a compromise underway between the Secretary of Labor and the Justice Department under which the draft Executive order would simply make it explicit that it does not, in and of itself, outlaw voluntary action plans by private employers. In the same breath, the Justice Department spokesman referring to this purported compromise said that white males would then have perfect freedom to bring a reverse discrimination law suit if the employer dared to rely on that proposed new sentence in the draft Executive order; and the Justice Department

is fully prepared to join in with those white males to attack the employers.

This is quite some compromise. There is a strong basis for requiring more of Government contractors than is required of other employers. Throughout the history of Government procurement in this century, the Government has recognized that the economic benefits provided by Government procurement contracts for goods and services need to be spread to a fair cross-section of the country. They need to be—these contracts need to be let in a way that enforces basic national policies.

More than six decades ago the Government decided that no goods and services coming to it would be made by child labor. This was long before the Fair Labor Standards Act outlawed the use of child labor under oppressive conditions.

Before the minimum wage was passed by Congress in 1938 as part of the Fair Labor Standards Act, Government procurement contracts required employers to use fair, minimum, regional wages. For 44 years, nondiscrimination requirements has been part of the Government policy.

There is time only to make one additional point, and that relates to the statement of administration officials that the only people who benefit from these affirmative action programs are highly educated, well advantaged people who do not really need the programs.

The example I'd like to give comes to us from the Lawyers' Committee's own litigation. We have a large number of cases and have in the past had a large number of cases against textile mills in the south.

Traditional patterns of textile employment are that you have jobs for white men, you have jobs for white women, you have hot, dirty, undesirable jobs low paid for black men. You have no jobs for black women.

We had a case against the J.P. Stevens Co., in the early 1960's. A facility of nine plants and three office facilities has four or five black women working for the company cleaning toilets. Four thousand employees in an area that was about 50 percent black.

Now throughout the progress of the various Executive orders with nondiscrimination, no change happened. When Franklin Delano Roosevelt signed his order on defense contractors covering textile mills, they made cloth for uniforms. That made no change. No black women got jobs.

Throughout the whole series, black women did not get jobs. When President Johnson signed his Executive Order 11246 in 1965, black women did not get jobs in the textile industry. The difference occurred under the Nixon administration, the last part of 1968, first part of 1969. It became clear that the Government was going to look at the actual results, the statistics that now the Reagan administration would like to prevent the Government from looking at, and compliance was going to be determined on the basis of how the contractor did and what excuses it had to offer for poor performance.

All of a sudden, black women began being hired in increasing numbers at textile mills across the South. Because of the nature of textile employment and the importance of dexterity as opposed to

education, many of the black women hired had not previously had any factory job. They had not previously had any job that paid the minimum wage.

Many had worked as domestic servants in houses for $20 a week for 40, 50, 60 hours worth of work, and now they were making industrial wages for the first time. Many had worked in the fields and been displaced by the mechanization of agriculture.

These are the most disadvantaged of all workers, and it was only the Government's concentration on the actual results that led to their entry into the textile work force, where now they are an indispensable element of the work force.

The proposed changes in the Executive order would stop that progress dead in its tracks, and it would transport us back in time, decades before the Nixon administration. People who presently obtained their jobs through the benefits of affirmative action would all of a sudden find that these jobs will tend to become deadend, not because management at national headquarters of large companies are determined to discriminate. I don't believe that's the case. The problem is that they have a real practical problem. How do you ride herd on all the managers of your hundreds of local facilities spread across the country? How do you make sure that the personnel manager operating a local plant does not start going back to the good ole boy networks, the old ways of doing things?

Right now we have a system that works, because corporate staffs can say the Government is requiring us to do these things, you have to pay attention to them. If a new Executive order is signed, the message that goes out will be that the Government is no longer doing that. Reverse discrimination law suits will rise. The protection that employers now have from those law suits will be lessened, and our progress will stop.

Thank you.

[The prepared statement of Richard T. Seymour follows:]

PREPARED STATEMENT OF WILLIAM L. ROBINSON [1] AND RICHARD T. SEYMOUR [2] ON BEHALF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you on the threats to an effective program of ensuring that government contractors do not discriminate in their employment practices against women and members of minority groups.

A. Introduction

The Lawyers' Committee is a nationwide civil rights organization, with local offices in Washington, Philadelphia, Boston, Chicago, Jackson, Denver, Los Angeles, and San

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Francisco. It was formed by the leaders of the American Bar in 1963, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Over the years, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics, and women in hundreds of class actions in the fields of employment discrimination, voting rights, equalization of municipal services, and school desegregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted us in these efforts.

The Federal government expends many billions of dollars a year to obtain necessary goods and services. For most contractors, their business with the Federal government constitutes a major source of their profits; for some contractors, virtually all of their business comes from government contracts. In a number of cases, the relationship between the government and its contractors is closer than ordinary commercial relationships. The widespread use of "cost-plus" contracts, in which the government contracts to assume all risks of the undertaking and to guarantee a particular profit level, is a form of subsidy. The government's bail-out of Lockheed several years ago, in order to ensure that Lockheed would continue to be able to perform its defense contracts, is another indication of the closeness of the government's relationship to some of its contractors.

It has long been accepted by both Republican and

Democratic Presidents and Congresses that government contracts provide enormous opportunities for employment, and that the government has a direct interest in ensuring that the employment benefits resulting from government contracts be made available to a fair cross-section of the workforce.

The government now stands at a crossroads. Some agencies wish to end all practical efforts to realize this goal, asserting that a program of voluntary compliance is sufficient, that the government should not even be allowed to look at an employer's actions to determine whether it is complying, and that employers which retain their own system of goals and timetables should be put in fear of potential lawsuits if they continue to do on their own what the government up to now has required them to do.

Part B of this Statement discusses the history of the effort to ensure that government contractors do not discriminate in their employment practices. See pp. 4-10. Part C discusses the effectiveness of the program. See pp. 10-17. Part D discusses the widespread acceptance of the program by business, labor, the courts, and Congress. See pp. 17-20. Part E discusses the continued need for the program. See pp. 20-21. Part F discusses the specific changes proposed by some Administration officials. See pp. 21-29. Part G discusses the importance of reliance on statistical proof of discrimination. See pp. 30-32. Part H states our conclusions. See pp. 32-33.

B. The History of the Executive Order Program

1. The Early Days -- 1941-1968

In considering whether or not it is advisable to dismantle the present Executive Order program, it is important to recall the painful history of Governmental efforts, undertaken by every President since Franklin D. Roosevelt to end job discrimination.[3] In 1941, President Roosevelt issued the first executive order banning discrimination by defense contractors. (E.O. 8802).[4] Executive Order 8802 established the Fair Employment Practice Committee (FEPC) to investigate complaints of discrimination and to recommend necessary measures to eliminate discrimination against minorities. President Roosevelt later expanded coverage of the executive order to all Federal government contractors and subcontractors.[5] According to the Final Report of the FEPC in 1946, however, "wartime gains of Negro, Mexican-American and Jewish workers were being lost through an unchecked revival of discriminatory practices."[6] The last

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[3] See e.g., Barry L. Goldstein, "The Historical Case for Goals and Timetables," New Perspectives, U.S. Commission on Civil Rights (Summer 1984), pp. 20-26; Citizens Commission Report, supra, note 8 at pp. 29-65.

[4] Executive Order 8802, 6 Fed.Reg. 3109, 3 C.F.R. 1938-43 Comp. 957, signed by President Roosevelt on June 25, 1941, for the first time required defense contractors, "not to discriminate on the basis of race, creed, color or national origin."

[5] E.O. 9001, 6 Fed.Reg. 6787, 3 C.F.R. 1938-43 Comp. 1054 (Dec. 27, 1941); E.O. 9346, 8 Fed.Reg. 7183, 3 C.F.R. 1938-43 Comp. 1280 (May 27, 1943).

[6] Final Report of FEPC (Washington, D.C., G.P.O: 1947, pp. 1-2). The percentage of workers in production industries who were black increased from 3% of all war production workers in

chairman of the FEPC, which was dissolved in 1946, observed that the FEPC was "concerned and diligent; [but it] simply had not been given the tools to do the job."[7]

Presidents Truman and Eisenhower each issued two executive orders extending the scope of coverage of non-discrimination requirements.[8] By the late 1950's, however, the Government concluded that remedies more effective than mere neutral non-discrimination provisions were necessary to ensure equal employment opportunity. President Eisenhower's Contract Compliance Committee, chaired by Vice President Richard Nixon, made clear that the major barrier to the hiring and promotion of minorities was "the indifference of employers to establishing a positive policy of non-discrimination." (emphasis in original).[9] President Kennedy adopted the Nixon Committee recommendation that "positive" action was needed and signed Executive Order 10925 in 1961. This Order established "the policy of the

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March 1942 to 8% at the end of the war. L. Ruchames, Race, Jobs and Politics - The Story of FEPC (New York: Columbia University Press, 1953), p. 159; Citizens' Commission Report supra, note 8 at pp. 33-34.

[7] Malcolm Ross, "Some Wartime Lessons on Ending Job Discrimination", The Washington Post, July 28, 1963, p. E-3, quoted in R. Nathan, Jobs and Civil Rights (Washington, D.C.: GPO, 1969, p. 150, n. 5).

[8] E.O. 10210 (1945) (Truman); E.O. 10210 (1951)(Truman); E.O. 10479 (1953)(Eisenhower); E.O. 10557 (1954)(Eisenhower).

[9] Committee on Government Contracts, Pattern for Progress, Final Report to President Eisenhower (Washington, D.C. 1959/1960), p. 14; see also United States Commission on Civil Rights, 1961 Report: Employment, Book 3, p. 75 (1961); Citizens' Commission Report supra note 8 at pp. 34-36.

executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons" and required "affirmative action" by all Federal contractors.[10] Since 1961, every Administration, including the present one, has obligated Federal contractors to take "affirmative action."[11]

At first, "affirmative action" under the Executive Order was not defined precisely. In 1967, the Director of the Office of Federal Contract Compliance (OFCC), offered the following pragmatic definition of affirmative action:

> "There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. ... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation."[12]

The present Executive Order, Executive Order 11246, was signed by President Johnson in 1965. The general direction of the OFCC in the early days of E.O. 11246 was to require "results", leaving the development of the means to the "ingenuity" of the con-

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[10] Executive Order No. 10925, 26 Fed.Reg. 1977, 3 C.F.R., 1959-63 Comp. 448, signed by President Kennedy on March 6, 1961. Race, creed and national origin discrimination have been barred by Executive Orders dating back to 1941. In 1967, sex discrimination was added to the list of prohibited discriminations and the word "creed" was changed to "religion." E.O. 11374 (1967).

[11] In passing Title VII of the Civil Rights Act of 1964, Congress specifically considered the Executive Order program and contemplated its continuance. Citizens Commission Report supra note 8 at 39-40; 110 Cong. Rec. 7215 (1964), 42 U.S.C. § 2000e-17.

[12] Edward C. Sylvester, Director of OFCCP, Report of 1967 Plans for Progress Fifth National Conference, pp. 73-74, quoted in Nathan, Jobs and Civil Rights, p. 93.

tractor.[13] But OFCC soon found that in many industries, particularly in those where exclusionary and discriminatory practices were long entrenched, general exhortations to engage in affirmative action did not produce results.

OFCC established a series of special area programs in 1965 to "assure minority group representation in all trades and in all phases of the work."[14] The process required the low bidder, prior to the award of the contract, to submit an affirmative action plan to meet that standard.[15] In order to meet this general requirement, a contractor under the Cleveland area program presented a specific proposal detailing the total number of employees he would use in each trade and indicating how many of that number would constitute his "goal" of minority employment. Soon the decision was made to require similar "manning" tables for all Federal construction in the Cleveland area.[16]

2. The Philadelphia Plan: 1969

After considerable debate in the late 1960's, the Labor Department under President Nixon issued the revised Philadelphia Plan in June 1969. The major provision in the revised Philadelphia Plan required that those bidding on Federal or Federally-assisted construction contracts submit goals for

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[13] Citizens' Commission Report, supra note 8 at 40-41.

[14] Jones, The Bugaboo of Employment Quotas, 1970 Wisc. L.Rev. 341, 343-44.

[15] Ibid., at p. 346, Goldstein, supra note 14 at p. 20.

[16] Ibid., at p. 346, Goldstein, supra note 14 at p. 20; Citizens' Commission Report supra note 4 at pp. 43-44.

minority employee utilization which were within a range established by the government, and commit themselves to make "good faith" efforts to achieve such goals:[17]

> "All that a contractor has to do to be eligible for a contract is to make a commitment to seek in good faith to meet his self-imposed goal. There is neither per se compliance nor per se violation associated with the goals or the ranges. Minority utilization above or below the goals, or above or below the ranges, at most is presumptive evidence of compliance on the positive side, and on the negative side, evidence of probable cause to believe that a review of a contractor's overall compliance posture is warranted.[18] (emphasis in original)

The Philadelphia Plan was found lawful in Contractors' Ass'n of Eastern Pennsylvania v. The Secretary of Labor, George P. Shultz, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).[19] Attorney General John N. Mitchell issued an opinion in September 1969 concluding that the Executive Order was lawful and that the Philadelphia Plan was a lawful implementation of the

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[17] Goldstein, supra note 14 at p. 22; Citizens' Commission Report, supra note 8 at pp. 45-48.

[18] Jones, supra note 25 at p. 379. Professor Jones was an Associate Solicitor of Labor and head of the division which provided legal services to the OFCC during the period of the development of the Philadelphia plan.

[19] The Seventh Circuit Court of Appeals upheld a similar plan stating that "[i]n this case we believe that numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality." Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 686 (7th Cir. 1972). See also e.g. Assoc. Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

Order.[20] The Assistant Secretary of Labor, Arthur Fletcher, stressed that "voluntarism" was not enough; the way to achieve "concrete results" is to set "specific goals."[21] A 1969 Congressional attempt to attach a rider to an appropriations bill outlawing affirmative action goals and timetables and the Philadelphia plan failed after extensive debate.[22]

3. Order No. 4 - Extension of Goals and Timetables: 1971

In 1971, Revised Order No. 4 was issued by OFCCP, extending the concept of goals and timetables to all nonconstruction contractors. This Order, which is still in effect, requires Federal contractors to undertake an availability analysis in order to determine if there were fewer women or minorities in their employ than would be expected according to their availability for work. If this analysis revealed an underutilization of minorities and women, the contractor is required to develop measurable goals and timetables and make a "good faith" attempt

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[20] 42 Op. Att'y. Gen. 405, 408 (1969).

[21] BNA, Daily Labor Report, August 25, 1969, p. E-2; See Goldstein, supra, at 22-23, Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 Chi. L. Rev. 723 (1972).

[22] 115 Cong. Rec. 40,013; 40,039; 40,906; 40,922; 40,749 (1969). Before the House rejected the rider, President Nixon stated "[t]he House of Representatives now faces an historic and critical civil rights vote." 115 Cong. Rec. 40,906 (1969). The President appealed to the House-Senate conferees "to permit the continued implementation of the Philadelphia Plan ..." BNA, Daily Labor Report, Dec. 19, 1969; Citizens Commission Report supra note 8 at 48-49.

to meet these targets.[23]

C. The Effectiveness of the Executive Order Program

1. The Lawyers' Committee's Experience

Before turning to empirical analyses of the effectiveness of the Executive Order program, I would like to share with the Subcommittee some of the Lawyers' Committee's experiences as to the effectiveness of the program.

As you know, one of the justifications being given by some Administration officials for weakening the Executive Order program is that it benefits only the well-educated minorities and women who do not need its help, and thus that the program is ineffective as a whole. In our experience in litigating cases, we have found that many poor and disadvantaged persons have been helped, and that in the hands of willing and capable administrators, the program has had and can have great effectiveness.

For example, the Lawyers' Committee has brought a number of fair employment lawsuits against textile companies in the South. As part of our cases, we routinely go into personnel records to show historical patterns in hiring and job assignments. In virtually all of our cases, we have found that few or no black women were hired in textile mills until the late 1960's. This was part of an industrywide pattern, under which white men and white women were hired for desirable jobs, black men were hired for low-paying, undesirable jobs, and black women were simply not hired at all. By 1968 and 1969, few

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[23] Goldstein, supra note 14 at p. 23.

lawsuits had been brought against textile firms, and the old patterns continued. In late 1968 and early 1969, however, the government began paying close attention to the poor employment statistics of many contractors. Sparked by a private lawsuit in the District of Columbia challenging a "gentleman's agreement" between a Defense Department official and a major textile company,[24] the government began to focus its attention on the textile industry. It became clear that textile mills' compliance would be determined by their success in hiring black women and that mere protestations of good-faith efforts would no longer be sufficient.

As soon as this lesson sank in, textile companies across the South began hiring black women in growing numbers. Many white textile workers had only elementary-school educations; it is in the nature of textile mills that dexterity is far more important to production than formal education. Accordingly, many of the black women hired in the late 1960's as a result of this affirmative action also had only elementary-school educations. For many, it was their first factory job and their first job paying the minimum wage.[25] Without the emphasis on numerical

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[24] The case did not result in any direct relief against the government, and was ultimately dismissed. It did, however, have the desired effect of increasing compliance efforts as to the textile industry.

[25] Many of the black women who were hired had previously worked in the fields and been displaced by the mechanization of agriculture, or had worked in private homes as domestic servants. Neither type of work was then subject to the minimum wage.

measures of compliance, these changes would never have occurred and these women---among the most disadvantaged of all workers---would never have been able to find decent jobs.

Our second example of the effectiveness of the Executive Order program is more subjective. We sue many types of employers, large and small, public and private. In general, we have found that discrimination tends to be broader in scope, more harmful in its effects, and more blatant when the employer is not a government contractor. For example, some of our cases against Federal agencies involve practices much worse than one would find in a case against a major national company which is a government contractor. The difference, we believe, comes from the fact that Federal officials, and private employers which are not government contractors, are not generally required to explain the underutilization of women and minorities, and are not generally required to adopt goals and timetables to eliminate deficiencies.[26] In plain terms, they do not have someone looking over their shoulders and asking for explanations whenever poor results are achieved. As a result, they pay less attention to the law.

2. Empirical Studies of the Program's Effectiveness

Several recent empirical analyses of the impact of

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[26] One glaring example should suffice to make this point. The U.S. Office of Personnel Management develops tests for hiring in a large number of government jobs. Notwithstanding the clear requirements of the law, it usually does not keep statistics showing whether its tests exclude minorities and women at disproportionately high rates. It is difficult to imagine a large government contractor so insensitive to vulnerability to a Title VII lawsuit.

affirmative action under the Executive Order have proven its effectiveness in increasing the employment of minorities and women while producing positive business results:

> "The evidence shows that two decades of affirmative action have helped produce many gains for minorities and women in our nation's workforce. While neither a panacea nor a substitute for economic growth, education, job training and ambition, affirmative action has made significant contributions to improved occupational status for many minorities and women, a closing of the gap attributable to discrimination.[27]

According to a study by OFCCP in 1983,[28] based on a review of more than 77,000 companies with over 20 million employees, minorities and women made significantly greater gains in employment at those establishments contracting with the

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[27] See Citizens' Commission Report, supra note 8 at p. 122. For a full discussion of the effectiveness of affirmative action, see pp. 122-146 of the Citizens' Commission report. Members of the Citizens' Commission include many prominent officials of both Republican and Democratic Administrations including Erwin N. Griswold, former Solicitor General of the United States; William H. Brown, III, former Chairman of the EEOC; Arthur Flemming, former Chairman of the U.S. Commission on Civil Rights, and Secretary of H.E.W; Elliot L. Richardson, former Attorney General and Secretary of H.E.W., Harold Tyler, former Deputy Assistant Attorney General, U.S. District Court Judge, and Assistant Attorney General for Civil Rights; Frankie M. Freeman, Murray Saltzman and Manuel Ruiz, former members of the U.S. Commission on Civil Rights; Eleanor Holmes Norton, former Chair, EEOC; Wilbur Cohen, former Secretary of H.E.W.; Ray Marshall, former Secretary of Labor; Grace Olivarez, former Administrator, Community Services Administration; Theodore Hesburgh, former Chairman, U.S. Commission on Civil Rights, Aileen Hernandez, former member of the EEOC, as well as Judge William M. Marutani, Court of Common Pleas of Pennsylvania; and former U.S. Senator Birch Bayh.

[28] Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women (1983).

federal government than at non-contractor companies.[29] Furthermore, this OFCCP study showed that federal contractors had a smaller proportion of minority and female employees locked into lower-paying jobs than non-contractors.[30]

A similar study of federal contractors and non-contractors, submitted to the Department of Labor in 1983 by Professor Jonathan Leonard of the University of California at Berkeley, "The Impact of Affirmative Action," corroborated the Department of Labor's findings.[31] Leonard found that:

> Black male employment share increased relatively more in contractor establishments under the affirmative action obligation than in non-contractor establishments between 1974 and 1980. This holds true in a number of specifications, and it holds true controlling for establishment size, growth industry, region, occupational structure, corporate structure, and past employment share. This appears to reflect changed establishment behavior, rather than the selection into contrac-

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[29] The study found that minority employment increased 20.1% and female employment increased 15.2% between 1974 and 1980 for federal contractors (with a total employment growth of only 3%), as compared to non-contractor company increases of 12.3% for minority employment and 2.2% for female employment (with an 8.2% total employment growth over the same period). Id. at p. 8.

[30] Among contractors, the proportion of minority employees who were performing skilled and white collar jobs increased from 37.9% in 1974 to 47.4% in 1980, while increasing only from 35.9% to 39.1% during the same period in non-contractor companies. Id. at p. 19.

[31] Jonathan S. Leonard, The Impact of Affirmative Action (1983). See also Testimony of Jonathan Leonard before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 10, 1985. These results were based on a comparison of Federal contractors subject to the Executive Order with non-contractors in a sample of nearly 70,000 establishments with more than 16 million employees, between 1974 and 1980.

> tor status of an establishment with high or growing black male employment share. This positive employment impact has been relatively greater in the more highly skilled occupations, and has resulted in net upgrading for black males.[32]

Leonard also found that black employment has increased faster at establishments that have undergone a contract compliance review than at establishments which have not undergone such a review.[33] A 1984 study by the Potomac Institute also found that affirmative action was a significant factor in increasing both the number of minorities and women in the workplace and the quality of their jobs.[34] The above findings, among others, belie the notion that making affirmative action purely voluntary would lead to the same results as under the existing contract compliance program.

The impact of the Executive Order program can perhaps be seen most graphically by relating two examples where industries started to implement affirmative action in the late 1960's and have continued to operate under such programs -- IBM and the Philadelphia construction industry.

Since establishing an equal opportunity department in 1968 to comply with the Executive Order, IBM's work force has changed dramatically. In 1962 IBM had 750 black employees, which increased to 7,251 in 1968 and to 16,546 in 1980. The composi-

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[32] Id. at p. 38.

[33] Id.

[34] Herbert Hammerman, A Decade of New Opportunity: Affirmative Action in the 1970's, Potomac Institute, Washington, D.C. (1984).

tion of IBM's officials and managers increased from 429 blacks, 83 Hispanics and 471 females in 1971 to 1,596 blacks, 436 Hispanics and 2,350 females by 1980. From a small representation of females and minorities in 1962 (12.7% and 1.5% respectively), by 1980, IBM had significantly integrated its workforce (22.2% female and 13.7% minority). It would be difficult to assert that IBM has suffered financially or otherwise because of such affirmative action.[35]

Before the Philadelphia plan was adopted in the late 1960's, OFCCP found that fewer than 1% of the Philadelphia area construction workers were minorities. Although far short of the Government's goal of 19 to 20 percent, by 1982 the percentage of Philadelphia construction workers who were minority had risen dramatically to more than 12%.[36]

Affirmative action has not only increased minority and female participation in the workforces of many companies, but "has led to a better working environment, improved communications and benefitted corporate relations with the community."[37] Many top management officials view affirmative action as "good business", part of "good corporate citizenship", resulting in an

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[35] See Citizens' Commission Report, supra note 8 at 126-127; Affirmative Action Coordinating Center, A Statement in Support of Affirmative Action: The IBM Story (1981) (unpublished paper).

[36] Citizens' Commission Report, supra note 8 at 127; Affirmative Action: Birth and Life of a "Bugaboo.", Washington Post, April 11, 1982 at A1, A10.

[37] NAM testimony, supra note 40 at pp. 10-11.

expansion of business in the communities in which they operate.[38] In addition, many companies witn affirmative action programs report that affirmative action has numerous other beneficial side effects, such as establishing or improving procedures regarding hiring, promotion, disciplinary actions and employee performance reviews,[39] and the production of "new ideas, opinions and perspectives in management, product development and marketing."[40]

D. The Executive Order Program Has Gained Broad Public, Judicial, and Congressional Support

Support for affirmative action is not limited to civil rights organizations. There is also strong support for affirmative action from both the business and labor communities. The National Association of Manufacturers (NAM), an organization of 13,500 corporations throughout the country which employs 85 percent of all workers in manufacturing, believes that

> affirmative action has been, and is, an effective way of ensuring equal opportunity for all people in the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included.

NAM recognizes that "setting goals and timetables for minority and female participation is a way of measuring progress and focusing on potential discrimination."[41]

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[38] Id. at pp. 130-141.

[39] Id. at pp. 142-146.

[40] NAM testimony, supra note 40 at p. 2.

[41] Prepared testimony of William S. McEwen, Director of Equal Opportunity Affairs for Monsanto Company, testifying on behalf of the National Association of Manufacturers before the Subcommittee on Employment Opportunities of the House Committee

The Executive Council of the AFL-CIO recently issued the following statement in support of affirmative action, condemning the proposed changes to the Executive Order:

> For almost 20 years, the federal government has required employers with whom it does business to make positive affirmative action effort to hire blacks, Hispanics, and members of other minority groups in representative numbers. This requirement has been a vital weapon in the battle against discrimination in employment.
>
> There are now efforts underway in Washington to disarm this key weapon -- to repeal the Executive Order issued by President Lyndon Johnson. Instead, President Reagan is being urged by some in his Administration to substitute a new Executive Order lacking any teeth.
>
> Such a move would represent a giant step backward in the fight against employment discrimination. The existing Executive Order has worked well in opening job opportunities to members of minority groups who have been discriminated against for too many years.
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> The AFL-CIO opposes repeal of Executive Order 11246. We have long supported--and continue to support--strong affirmative action. We urge the Administration to cease its constant search for ways to weaken the nation's civil rights laws, and instead to commit itself to enforcing those laws vigorously and effectively.[42]

In 1972, while Congress was considering amendments to Title VII of the Civil Rights Act of 1964, there were several attempts to pass legislation ending the use of goals under the

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on Education and Labor, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 10, 1985, pp. 1-4, Excerpts were reported in the Washington Post, Friday August 16, 1985, A-23 (hereinafter referred to as "NAM testimony").

[42] Statement by the AFL-CIO Executive Council on Affirmative Action, August 15, 1985, Pittsburgh, Pa. (emphasis added)

Executive Order. None of these attempts succeeded. In voting down these changes, the Congress "at long last unequivocally approved the affirmative action program of the executive."[43] After reviewing the Executive Order program in detail, Congress recognized that it was "vital", that it needed a greater enforcement effort, that affirmative action was central to the program, and that the program should be continued.[44] The Ninth Circuit Court of Appeals noted that "there can be no doubt that the essential feature of the affirmative action program reflected in the regulations promulgated in Revised Order No. 4 were effectively ratified by Congress in adopting the Equal Employment Opportunity Act of 1972."[45]

Since 1965, Executive Order 11246 has been widely accepted as an integral part of the government contracting process. Despite arguments by the Justice Department in the past year that the Supreme Court, in the Memphis Firefighters case,[46] outlawed affirmative action not limited to proven individually identifiable victims of discrimination, the seven Circuit Courts of Appeal to consider the validity of affirmative

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[43] Comment, The Philadelphia Plan, supra, 39 Chi.L.Rev. at 757; 118 Cong. Rec. 2276 (1972).

[44] Id., at p. 26; 118 Cong. Rec. 1662-1676; 2275-76 (1972); 118 Cong. Rec. 1398 (1972); Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, pp. 915, 927, 1406-07, 1519-20.

[45] Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319, 1329-30 n. 14 (1979), cert. denied, 447 U.S. 921 (1980).

[46] Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

action plans and court orders after the Memphis case have unanimously rejected the Justice Department's interpretation.[47]

E. The Need for Continued Affirmative Action

Although significant progress has been made because of the Executive Order, "much more must be done to ensure that opportunity exists at all levels."[48] The majority of women and minorities remain concentrated in low paying, low-status occupations or are disproportionately unemployed. The median income of black families today is about $ 8,000 less than that of white families, and 13.7% of black men are unemployed as compared to 6.6 percent of white men.[49] Similarly, although women's salaries have increased, a woman working full-time still earns on an average only approximately 63 percent of male income.[50] The dismantling of a pervasive system of discrimination against minorities and women, begun only in the past generation, and the

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[47] See Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, 105 S.Ct. 782 (1985); Turner v. Orr, 759 F.2d 817, 823-824 (11th Cir. 1985); Diaz v. American Telephone & Telegraph Co.., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985); EEOC v. Local 638 Sheet Metal Workers' Int'l Assn., 753 F.2d 1172, 1185-86 (2d Cir. 1985); Grann v. City of Madison, 738 F.2d 786, 795 n.5 (7th Cir.), cert. denied, 105 S.Ct. 296 (1984), Devereaux v. Geary, No. 84-2004, 38 Fair Empl. Prac. Cas. 23 (BNA) (1st Cir. June 24, 1985), Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, No. 84-1614 (3d Cir. July 17, 1985), Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985).

[48] Id. at pp. 3.

[49] Washington Post, March 31, 1985, K1.

[50] U.S. Census Bureau, Current Population Reports, P-60, No. 140, Money Income and Poverty Status of Families and Persons in the United States: 1982 at 18 (1983).

creation of a more equal and just society are goals of paramount importance -- but they are goals that are not easily achieved. In many areas, affirmative action under the Executive Order is just starting to make a dent in eradicating entrenched discrimination.

In addition to the general need for continuation of the present program, there are particular areas of the economy in which a return to discrimination is all but inevitable if the present requirements are relaxed. For example, the construction industry and craft unions have made progress primarily through the compulsion of litigation and the Executive Order program. The Sheet Metal Workers union in New York is still embroiled in litigation over ongoing discrimination and refusal to implement past court orders; the Operating Engineers in Philadelphia have just lost their most recent case. It is, perhaps, significant that the one segment of American business to applaud the proposed weakening of the Executive Order program has been the construction industry.

F. The Weakening Changes Proposed by Some Administration Officials

The Attorney General and the Office of Management and Budget have drafted a proposed executive order which would amend Executive Order 11246 and strip from the program everything of value.

The draft Executive Order would make four major changes in the existing Government contract compliance program:

1. Elimination of Goals and Timetables

Under the present Executive Order, government contractors are required to analyze their work force and to adopt goals and timetables where the facts show a need for such action. Since the Philadelphia Plan was adopted by the Nixon Administration in 1969, the use of goals and timetables has been an especially effective method of assuring equal employment opportunities for women and minorities. By encouraging contractors to hire qualified women and minorities in accordance with their availability in the labor force, the Executive Order program has greatly reduced underemployment and underutilization of qualified minority and women workers. Regulations implementing the present Executive Order specifically preclude "inflexible quotas," providing only for "good faith" efforts to reach "reasonably attainable" goals.[51]

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[51] The Department of Labor regulations governing the Office of Federal Contract Compliance Programs (OFCCP) provide:

> (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.
>
> 41 C.F.R. §60-2.12 (1984)

As Labor Secretary Brock has stated: "[t]here is a distinction which you can make between absolute numbers and quotas and so-called goals approaches." (Address before the NAACP convention, Dallas, Texas, June 24, 1985), Washington Post, Friday, August 16, 1985 at A23.

The essence of the distinction is that goals are flexible objectives subject to the availability of qualified women and minorities; quotas are strict requirements which do not

The proposed new executive order would prohibit the government from seeking to have contractors adopt affirmative action plans that include numerical goals and timetables. The draft Order would stop the Department of Labor from obligating contractors to engage in any form of race or sex-conscious affirmative action, even the watered-down form of affirmative action that the Civil Rights Division of the Department of Justice has advocated during the Reagan Administration -- affirmative recruitment.[52]

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depend on workforce availability. See "Affirmative Action to Open the Doors of Job Opportunity," A Report of the Citizens Commission on Civil Rights, Washington, D.C., June 1984 at pp. 66-69 (hereinafter referred to as "Citizens Commission Report"). Failure to meet a goal does not subject a contractor to sanctions under the Executive Order; contractors need only demonstrate "good faith efforts to make its program work toward the realization of the program's goals within the timetables set for completion." 41 C.F.R. §60-2.15 (1984)

[52] The Justice Department has embarked on a campaign to eliminate hiring goals and timetables in 51 cases involving state and local government agencies across the country. It has tried to persuade courts to replace hiring goals with provisions requiring that the employer recruit so that a given percentage of applicants would be black, or Hispanic, or female. The draft Executive Order would rule out even this form of affirmative action:

> "Sec. 217 Nothing in this Executive Order shall be interpreted to require or to provide a legal basis for a Government contractor or subcontractor to utilize any numerical quota, goal, or ratio, or otherwise to discriminate against or grant any preference to, any individual or group on the basis of race, color, religion, sex, or national origin with respect to any aspect of employment, including but not limited to recruitment, hiring, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship." (Emphasis supplied).

2. Barring the Use of Statistical Evidence

Under the present Executive Order, the Office of Federal Contract Compliance Programs can consider the same kind of evidence that a court would examine to determine if a contractor is in violation of the law. The Supreme Court has uniformly held over the last 50 years that statistics are an important form of evidence to be considered in discrimination cases, and the courts routinely rely on statistical evidence in deciding cases of employment discrimination.[53] Evaluation of statistical evidence is an important part of the Executive Order program.

The proposed Executive Order would bar consideration of statistical evidence no matter how compelling and no matter how great the weight the courts would give to such proof. The Labor Department would thus be required to ignore facts that courts and ordinary citizens understand are very relevant in determining the existence of discrimination.

3. Limiting the Types of Discrimination Covered

The present Executive Order covers the same types of discrimination which are covered by Title VII of the 1964 Civil Rights Act:

--"disparate impact" discrimination, which concerns practices that disproportionately exclude

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[53] See, e.g., Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood School District v. United States, 433 U.S. 299, 302, 308 n.13 (1977), and New York City Transit Authority v. Beazer, 440 U.S. 568, 584-585 (1979). Teamsters relied on a line of jury discrimination cases going back to Norris v. Alabama, 294 U.S. 587 (1935).

minorities or women from consideration and are not job-related;[54]

--"disparate treatment" discrimination based on subjective factors and proven by statistics (such as, that 90% of white applicants are hired, but only one out of a hundred black applicants are hired, where the employer has no objective qualification standards which would explain such a result);[55] and

-- the rare case of open, intentional discrimination ("whites only" or "women not wanted" signs are classic examples).

The proposed Executive Order appears to restrict coverage under the Executive Order to "demonstrated nondiscriminatory treatment." This language, along with the command not to consider statistical evidence, would effectively limit the reach of the Executive Order to only those unusual cases where there is direct evidence of discrimination. Blatant acts of discrimination rarely occur, and companies are not likely to acknowledge openly that their conduct is discriminatory. Thus, the Executive Order would no longer cover most forms of discrimination and would prohibit neither "disparate impact" nor "disparate treatment" discrimination by Government contractors.

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[54] See e.g., Griggs v. Duke Power Company, 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[55] See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

4. Disincentives to Voluntary Action

The present Executive Order encourages voluntary action even where there is no governmental proceeding against the contractor. The most notable example of such voluntary action was an agreement between Kaiser Aluminum Co. and United Steelworkers of America to create a job training program to increase the number of black skilled workers at the company. The Supreme Court approved this kind of voluntary action in the Weber case.[56]

The proposed Executive Order provides a disincentive for such voluntary action by asserting that it does not "provide a legal basis" for the contractors to use goals and timetables, even for training. Thus, a company could not rely on its legal obligations under the Executive Order as a justification for the adoption of a voluntary plan as was done in Weber. This can only result in an increased number of contested cases and a delay in progress toward true equal opportunity. Voluntary compliance would be discouraged instead of encouraged.

In short, the draft Order, if signed, would constitute one of the most disturbing and significant civil rights retrenchments of the past half-century. It sharply conflicts with numerous rulings of the courts, the provisions of the fair employment laws, and even the Justice Department's own position on limitations on remedies for past discrimination. The draft

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[56] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

would leave nothing but the facade of the present enforcement program, would effectively limit the Executive Order to rare cases in which direct proof of intentional discrimination is available, and would discourage voluntary affirmative action.

5. The Reported "Compromise" Language

There have been recent press reports that some officials within the Administration are attempting to reach a "compromise" which would leave the program just as dead, but look a little better. Under this "compromise", a provision would be inserted in the draft executive order or in the regulations stating that, while the government would no longer require goals and timetables, the executive order would not forbid employers continuing their own voluntary programs of goals and timetables. It would thus make explicit what was already implicit in the earlier draft.

We submit that this is a distinction without a difference. The "compromise" would still bar contractors from relying on the executive order program as a defense to a reverse discrimination lawsuit, and the Justice Department has stated its eagerness to sue any employer who dares to rely on the "compromise" language. On September 11, 1985, the Washington Post reported on p. A1:

> In addition, Justice Department officials note that employers could not use the executive order as justification for imposing goals and timetables if they are challenged in court, for example, by white employees concerned that the plan may be unfair to them.
>
> "Under Title VII, no discrimination is

> permitted in hiring or promotion of employees," said a Justice Department official. "If that is the case, it would be up to the courts to lay that down as the law . . . . The Justice Department might even side with the complainants who brought such a case."

6. The Consequences of Making the Proposed Changes

As the Equal Employment Opportunity Commission (EEOC) and the Justice Department, combined, file only a couple of hundred fair employment lawsuits a year (out of almost 10,000 new cases filed under the fair employment laws by private citizens each year), the Labor Department's monitoring of thousands of government contractors each year under the present Executive Order has been the federal government's main weapon in combatting job discrimination.

Any change in the Executive Order would have great symbolic importance, and -- even if not intended to have any effect on the actual operations of OFCCP -- would be perceived to be a weakening of the program, and would lead contractors to reduce their efforts. It is not always easy for a large company to monitor the personnel practices of the plant managers and personnel officials at each of its farflung facilities. In the last few years, some corporate managers have indicated that perceptions of a slackening of governmental interest in enforcing civil rights were making it more difficult for them to keep their local managers from returning to their old ways of recruitment, hiring and promotion.[57]

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[57] Citizens' Commission Report, supra note 8 at 139.

Revoking the Executive Order would permit and encourage local plant managers in numerous companies to go back to their old ways -- hiring mostly white males -- thus exposing companies to increasing legal liability for employment discrimination under Title VII of the Civil Rights Act of 1964.[58] This can hardly be desirable from either a management or an employee perspective. Instead of its traditional role of encouraging employers to take affirmative action, the U.S. Government would be at the forefront of an historic civil rights retreat.

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[58] The proposed Executive Order would not change the standards of liability for employment discrimination under Title VII. The Courts of Appeals have unanimously recognized that, in some cases, the need to eradicate the effects of widespread discrimination calls for prospective, race-or-gender-conscious affirmative relief. See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027-1028 (1st Cir., 1974), cert. denied, 421 U.S. 910 (1975); Equal Employment Opportunity Commission v. Local 638 ... Local 28 of the Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172, 1185 (2d Cir., 1985); Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 279-81 (2d Cir.), cert. denied, 455 U.S. 988 (1981); Rios v. Enterprises Ass'n. Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir., 1974); Kromnick v. School District of Philadelphia, 739 F.2d 894, 909-10 (3rd Cir., 1984), cert. denied, 105 S.Ct. - 782 (1985); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-177 (3rd Cir. 1977), cert. denied, 438 U.S. 915 (1978); Chisholm v. United States Postal Service, 665 F.2d 482, 499 (4th Cir., 1981); United States v. City of Alexandria, 614 F.2d 1358, 1363-1366 (5th Cir., 1980); United States v. I.B.E.W., Local No. 38, 428 F.2d 144, 151 (6th Cir.), cert. denied, 400 U.S. 943 (1970); United States v. City of Chicago, 663 F.2d 1354, 1362 (7th Cir. 1931)(en banc); Firefighters Institute v. City of St. Louis, Missouri, 616 F.2d 350, 364 (8th Cir., 1980), cert. denied, 452 U.S. 938 (1981); United States v. Ironworkers Local 86, 443 F.2d 544, 553-554 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-44 (10th Cir., 1979); Segar v. Smith, 738 F.2d 1249, 1293-94 (D.C. Cir., 1984) petition for cert. filed, 53 U.S.L.W. 3567 (U.S. Feb. 19, 1985); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir., 1982); Palmer v. District Board of Trustees, 748 F.2d 595, 600 (11th Cir., 1984).

G. The Importance of Relying on Statistical Evidence of Discrimination

We have touched above on the importance of statistical evidence of discrimination, and the 50-year line of Supreme Court cases relying on statistical proof of discrimination. There is simply no room for reasonable argument on this question.

Notwithstanding the clarity of the law, some officials of this Administration seem to have a personal dislike of statistical evidence, and they seem to be willing to override the law with their own personal preferences. For example, Chairman Thomas of the Equal Employment Opportunity Commission has stated that the EEOC has relied too heavily on statistical proof, and that he wants the agency to place much less reliance on statistical proof in the future.[59] We are informed that, at some local offices of the EEOC, they believe they are no longer allowed to rely on statistical proof in determining whether there is reasonable cause to believe a charge of discrimination is true. The draft executive order's ban on statistical evidence is just another example of this type of personal predilection.

In point of fact, much of Chairman Thomas's and other Administration officials' comments about statistics and adverse impact, reflect a basic misconception of the law and of practice. Chairman Thomas's public statements refer to a parade

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[59] New York Times, December 3, 1984, pp. 1, B16. A copy of the article is attached to the December 14, 1984 testimony as Attachment C.

of horribles which has no basis in reality---that courts and the Commission routinely find employers liable for violating Title VII on the basis of raw statistics, without ever giving the employer a chance to explain that the numbers are incorrect, or that there is a nondiscriminatory explanation---such as, that many of the minority applicants are too young to be hired, or are still in school. In reality, there is no such problem. As Judge Friendly of the Second Circuit observed twelve years ago:

> We must not forget the limited office of the finding that black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

Moreover, the Chairman's statements disapproving the use of statistics in establishing adverse impact, and his insistence of anecdotal proof instead, would tend to render Griggs a dead letter. It is hard to understand how any plaintiff could prove that a test or other selection standard disproportionately excludes members of minority groups or women unless one counts the applicants and the selections. Chairman Thomas' approach would make it hard ever to get to the point at which an employer would have to justify its practices. Vulcan Society of N.Y. City Fire Dept. v. Civil Service Commission, 490 F.2d 387, 393 (2nd Cir., 1973). The Supreme Court made the same observation in 1977, in the course of holding that unrebutted statistics can in and of themselves prove employment discrimination, without the need for any further proof. Int'l Bhd. of Teamsters

v. United States, 431 U.S. 324, 339-341 (1977). The Court quoted a decision of the Eighth Circuit:

> "...In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." United States v. Ironworkers Local 86, 443 F.2d, at 551.

431 U.S. at 339 n. 20.

For the Commission or OFCCP to turn their backs, even partway, on such a necessary tool of proof would blind them to the discrimination actually revealed in their cases, would blind them to the most persuasive evidence of nondiscrimination an employer could offer, and would produce results in the administrative processes which would vary, in a completely arbitrary manner, from the results a court would reach. Such arbitrary results would benefit no one, and would vastly increase the burdens on businesses attempting to comply with the law.

H. Conclusion

The Executive Order program has historically been the government's greatest weapon against job discrimination. It has long suffered from inadequate enforcement, particularly during the tenure of Secretary Donovan. Under the leadership of Secretary Brock and of Mr. Cooper, we had had strong hopes that the program would be stepped up and come closer to its potential.

The attempts of some Administration officials to kill the program by eliminating enforceable requirements for goals and timetables to remedy problems of potential discrim-

ination, and by barring the Labor Department from considering the actual actions of employers in hiring and promoting minorities and women, have raised the most serious questions to come before the Department of Labor for many years. No issue of greater importance is likely to arise during Secretary Brock's tenure, and we submit that the success of his tenure will stand or fall on his ability to protect the present Executive Order program and to make it fully effective.

Mr. HAYES. Thank you. All three of you panelists have made strong statements and given—presented us with written testimony supporting any efforts of the administration to submit—or Congress to come up with any crippling amendment to the current Executive order or the administration to eliminate 11246.

Your statement in its entirety will be made a part of this record, and I just want you to know that it may take some real doing in order to try to make sure what you say becomes a reality in view of the pressures, as you well know, that are developing to weaken the Executive order.

Now I have for the record a statement which I want to enter into the record, a letter addressed to the President of the United States signed by the chairman and the ranking minority member of the Committee on Education and Labor with 126 signatures of my colleagues in the House supporting this letter, supporting the position essentially which you have taken. I want to make that letter a part of this record, there being no objection.

[The letter follows:]

Congress of the United States
Washington, DC 20515

September 17, 1985

The Honorable Ronald W. Reagan
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

We understand that White House staff has drafted an executive order repealing requirements that federal contractors set numerical goals to remedy discrimination in the workplace. The proposed amendment to Executive Order 11246 would effectively undercut a major tool against employment discrimination which has been in effect and indeed has been strengthened by Republican and Democratic Administrations since 1961.

As you know, Mr. President, civil rights victories have been won in our nation only because of bipartisan cooperation. We have fought against discrimination in education, voting, public accommodations and employment. Today, minorities and women have finally begun to be included in the American mainstream.

Executive Order 11246 has now been in place for twenty years, during three Republican and two Democratic Administrations. It has been a mainstay of federal efforts to combat discrimination in the workplace. Complaints about the enforcement of the regulations issued pursuant to the Executive Order, where valid, should be addressed. However, we do not believe that we can successfully maintain our efforts against discrimination without the use of numbers.

We understand that there have been objections to numerical goals and timetables on the ground that such goals and timetables are tantamount to quotas, giving rise to complaints of reverse discrimination. However, the regulations implementing the Executive Order state that, "goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work" (41 C.F.R. sec. 60-2.12 (1984)). Thus, the regulations ~~draw~~ a distinction between the two terms. In the same way, the use of statistical comparisons in proving

discrimination in employment, which has been sanctioned by the Supreme Court, creates a presumption, not a conclusive determination, that discrimination is the basis for any statistical disparity found.

The use of goals and timetables as well as statistics remains an essential tool in combatting discrimination. Indeed, the Supreme Court has sanctioned the use of statistics in proving discrimination in employment. Moreover, Congress and the Executive Branch often set numerical goals to measure the effectiveness of programs. We think much of the success of the Job Training Partnership Act, for example, can be laid to the fact that the law stipulates performance standards to provide a numerical measure of our training programs' success. Likewise, we think we must continue to use numbers to measure our affirmative action programs' success.

Business "goes by the numbers" in production, sales and finance. It is commonplace to do so in hiring and promotion as well. Indeed, some members of the business community have urged the continued use of numerical goals and timetables in the belief that setting numerical goals is a useful business practice, entirely apart from the affirmative action responsibilities incumbent upon a federal contractor.

Congress itself in the 1972 amendments to title VII of the Civil Rights Act of 1964 (section 717) not only required that federal departments, agencies, and instrumentalities be made free from any discrimination in employment based on race, color, religion, sex, or national origin, but also specifically required each to develop and maintain an affirmative program of equal employment opportunity and submit periodic progress reports on the operation of its equal employment opportunity plan. Similarly, Congress imposed affirmative action plan requirements for federal departments, agencies, and instrumentalities in connection with the employment of handicapped individuals (section 501(b) of the Rehabilitation Act of 1973) and the employment of service-connected disabled veterans (section 2014(c) of title 38, United States Code). In the case of handicapped individuals, service-connected disabled veterans, and Vietnam-era veterans, Congress also expressly imposed affirmative action plan requirements on federal contractors and subcontractors (section 503 of the Rehabilitation Act of 1973 and section 2012 of title 38, United States Code).

In enacting these laws, Congress was cognizant and supportive of the Executive Branch policy of implementing affirmative action requirements through goals and timetables and statistical evaluations.

We believe that continuation of affirmative action, including the use of numerical goals and timetables, is a necessary and proper response to the tragic legacy of historical discrimination which continues to plague our country today. It is a tribute to the success of efforts against discrimination that we are seldom today faced with the types of overt discrimination we faced twenty years ago. The discrimination which remains today is more subtle and more difficult to eradicate. Without the use of numbers as an indicator, our job of eliminating discrimination in the workplace will be vastly more difficult, if not impossible.

We also believe that the use of recruitment and training as the only affirmative action measures mandated by the government would be an insufficient response to the problems of discrimination. Nondiscrimination laws involving only voluntary efforts did not work. It was only after the use of goals and timetables were established that discrimination began to fall.

The fundamental principle underlying Executive Order 11246 is that federal monies must not be used to subsidize discrimination and that the privilege of doing business with the Federal Government entails certain special responsibilities. Indeed, many employers understand this imperative and have, by now, incorporated affirmative action principles throughout their personnel procedures. By eliminating the use of goals, timetables and statistics to remedy the effects of discrimination, the Federal Government will be dramatically retreating from this principle.

We strongly urge, Mr. President, that no action be taken on Executive Order 11246 until there has been a full public review of the proposal, and an opportunity to assess its potential impact upon those who look to the Federal Government to preserve their equal employment opportunity rights.

Sincerely,

Augustus F. Hawkins
Chairman
Committee on Education and Labor
U.S. House of Representatives

James M. Jeffords
Ranking Republican Member
Committee on Education and Labor
U.S. House of Representatives

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Mr. HAYES. In addition to that, I have a statement from the chairman of the committee himself supporting and stating his reasons for his position in support of the retention of 11246, and that also will become a part of the record.

[The statement of the chairman follows:]

Opening Statement of Hon. Augustus F. Hawkins, Chairman, Committee on Educaction and Labor

Thank you Chairman Martinez for convening this important hearing concerning the Office of Federal Contract Compliance Programs of the Department of Labor. This hearing will address issues which have recently arisen and which threaten the foundation of equal employment opportunity laws and policies which have been in place since the Roosevelt Administration.

In August of this year, while the House was in recess and while the Secretary of Labor was vacationing in Africa, a draft proposal to amend Executive Order 11246 appeared. This proposal would not only remove any legal basis for Federal contractors' using goals and timetables to remedy the effects of discrimination, but would prohibit the use of statistics to measure or prove that there was discrimination. Subsequent newspaper articles suggest that another draft executive order now exists which would also prohibit the requirement that Federal contractors use goals and timetables as statistical measures.

I have co-signed a letter which has been delivered to President Reagan today and which expresses the view of one hundred twenty-six Democrats and Republican Members of the House and Senate that the use of goals and timetables as well as statistics is an essential tool in combatting discrimination. Indeed, as the letter states, the Supreme Court has sanctioned the use of statistics in proving discrimination in employment. Congress and the Executive Branch often set numerical goals to measure the effectiveness of programs. However, as the September 16, 1985, Fortune article noted, "business goes by the numbers." It is commonplace to use numbers - goals and statistics - in hiring and promotion decisions as well as in production, sales and finance. I ask that this letter be entered into the record.

Let me state for the record that the fundamental principle underlying Executive Order 11246 is that federal monies must not be used to subsidize discrimination. By eliminating the goals, timetables and statistics requirement, the Federal Government will have retreated from this principle and will be ,effectively, a party to discrimination. This, Mr. Chairman, is unconscionable as it will overturn forty years of progress which women and minorities have made.

This hearing will also address the current enforcement activities of the Office of Federal Contract Compliance Programs. The Department of Labor's Office of Inspector General briefed Committee and Subcommittee staff recently, and were informed that there were major problems confronting the existing program: First that actual enforcement personnel were only 45% of all OFCCP personnel. This suggests that the agency is managerially top heavy and that insufficient funds are being used to perform the most essential function of the OFCCP program. Second, that procedures for enforcement prevent the actual enforcement in a complete, timely and economical way. For example, OFCCP has identified and is monitoring only 23% of all construction contractors covered by the Executive Order. If these contractors don't file the required reports, they are not reviewed by OFCCP. Thirdly, OFCCP does not attempt to measure or report on results of its enforcement efforts. It only releases productivity statistics. Thus, OFCCP boasts that it completes 5,000 compliance reviews per year but does not announce the effect of these compliance reviews. It therefore appears, Mr. Chairman, that OFCCP's enforcement activity has been minimal. I hope that this hearing will shed some light on this matter.

Thank you, again, Mr. Chairman, for holding this important hearing.

Mr. HAYES. Thank you very much. With that, the hearing of this subcommittee will stand in recess.

[Whereupon, at 1:04 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

HOWARD UNIVERSITY
2935 UPTON STREET, N.W.
WASHINGTON, D. C. 20008
FOUNDED BY GENERAL O. O. HOWARD

SCHOOL OF LAW

September 25, 1985

The Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment Opportunities
U.S. House of Representatives
518 House Office Building, Annex No. 1
Washington, D.C. 20515

Dear Congressman Martinez:

This will acknowledge receipt of your letter dated September 18, 1985 inviting me to testify before the Subcommittee on Employment Opportunties on Monday, September 30, 1985 on matters pending before the Equal Employment Opportunity Commission.

Regretfully, I am unable to arrange my schedule to offer testimony during that week. I am just over subscribed at the present time with compelling responsibilities at the law school.

There is one issue, however, involving EEOC that I have great concerns about -- that is, the talk about revising the Uniform Guidelines on Employee Selection Procedures (UGESP). Recently, I addressed this issue in a two part series in the National Law Journal. See, The EEOC's Standards For Employment Testing, National Law Journal, September 16, 1985, at 22; Testing Must Relate to Specific Job Requirements, National Law Journal, Sept. 30, 1985, at 26 (enclosed).

I hope that these articles adequately explain the need why UGESP should be maintained. I have talked with both Ms. White and Mr. Jensen on your staff, and I hope that you will include these articles as part of the record during your hearings.

I am also enclosing a copy of a speech entitled, "Keep Your Eyes On EEOC" that I gave before the NAACP Emergency Summit Meeting on May 17, 1985. On pages 5-6, I discussed my personal experiences regarding the real aim to revise UGESP when I was Acting Chairman of EEOC. You may wish to include this speech in the record also.

Thank you again for inviting me to participate in these important proceedings. I look forward to working with you in the future.

Sincerely,

J. Clay Smith, Jr.
Professor of Law

JCSjr:ew

Enclosure

KEEP YOUR EYES ON E.E.O.C.

By

J. Clay Smith, Jr.*

After the 1980 presidential election, many transition teams were formed by the Administration to draw up policy plans for new leaders of government. At the time, I was a member of the EEOC. The President had not as yet appointed me as Acting Chairman.

The Republican Transition Team Captain for EEOC categories was Jay A. Parker. He was aided by a host of other people. Other names listed as members of the Transition Teams included Allan C. Brownfield and Jane Saxon. In the area of policy and programs review, Mr. Parker was aided by Jack Erickson, in personnel by Michelle Easton, in Legislative initiatives by William Keyes, in Regulations and Guidelines by Andrew W. Lester and Clarence Thomas, in Budget by W.K. Biddier, in Legal Affairs by Jonathan C. Rose and listed as advisors were Larry Brown, Hugh Joseph Beard, Jr., and Eddie Jackson, to name a few.

In a Transition Memorandum dated December 22, 1980 Clarence Thomas wrote a memorandum to Jay Parker in which he stated,

> "The Civil Rights Act of 1964 does not authorize the Equal Employment Opportunity [sic] to require affirmative action. . . . There appears to have been little effort made to determine

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*/Dr. Smith is a Professor of Law at Howard University School of Law. These remarks were made before the National Association for the Advancement of Colored People's Emergency Summit Meeting on Friday, May 17, 1985, at the Dupont Plaza Hotel in Washington, D.C. Dr. Smith was a member of the Equal Employment Opportunity Commission from 1978-1981. He served as Acting Chairman from 1981-1982.

> whether disadvantage minorities and women have actually been helped as a result of affirmative action."

Thomas then concluded that "EEOC has extended its authority to include voluntary affirmative action in the private sector without constitutional or statutory basis. Moreover, the assumption that this approach would help minorities and women overcome disadvantages caused by past discrimination has not been verified or reassessed." Hopefully, Clarence Thomas, who in 1980, said that if he "ever went to work for the EEOC. . .my career would be irreparably ruined" now knows that his understanding of both the law and the facts about affirmative action were in error. Williams, Black Conservatives, Center Stage, Wash. Post, Dec. 16, 1980, at A21, col. 2.

We are here at this Summit not only to assess the extent of the assault of the Administration on labor, education and housing issues; we are also here to affirm the validy of the principles in which we believe and liberty for which we will contest.

The blueprint of what is the position of the Department of Justice on Affirmative Action was uttered in former Attorney General French Smith's first major address in Philadelphia.on May 23, 1981 before the American Law Institute. It was French Smith, representing the views of the Administration who proclaimed that class based remedies in Title VII litigation should be tailored to allow relief to only identifiable victims.

It was from this point and based upon Attorney General Smith's theme that has given William Bradford Reynolds a free hand at attempting to

dismantle affirmative action, congressionally created or otherwise, and set-asides to increase the number of minority entrepreneurs.

This group need not tarry on the question of whether affirmative action is constitutionally permissible. The United States Supreme Court, in its decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), held that a properly tailored voluntary affirmative action plan and evidence of past discrimination fell within the test of reason. This decision and other lower court opinions upholding the constitutionality of affirmative action under Title VII of the Civil Rights Act of 1964 were on the books prior to the EEOC Transition Team's final report. This is why I question the basis of the statements of the current Chairman of the EEOC concerning the permissibility of affirmative action — voluntarily of judicially imposed. From the record, it appears that Chairman Thomas came to the position of the EEOC with a predisposition on questions of law and fact about the definition of discrimination and affirmative action. Hopefully, the full Commission will continue to fulfill their duties under Title VII as interpreted by the Courts.

Using Chairman Thomas' own words, let me pose this queston: Have "disadvantaged minorities and women . . . actually been helped as a result of affirmative action"? If a showing can be made that minorities and women have been helped, such a showing would seem to leave the Chairman without any publically stated reason to continue to speak out against affirmative action or to otherwise bow to the unjust policies of the Department of Justice.

What are the facts? In a recent study of the Potomac Institute, a Washington research center covering the period of 1970-1980 using statistics published by federal agencies, it found:

> American women and minorities made unprecedent employment gains during the 1970's.
>
> Minorities and women received more jobs and substantially better jobs during the last decade.
>
> The percentage of women and minorities in professional, managerial and other top white-collar jobs increased markedly between 1970 and 1980 in both government work and private industry.
>
> The proportion of blacks who were managers or officials doubled to four (4%) percent of the work force, while the number of women in those top jobs increased from ten (10%) percent to work force of eighteen point five (18.5%) percent.

See A Decade of New Opportunity: Affirmative Action In The 1970's (Oct. 1984); Kaufman, Affirmative Action called Effective, The Philadelphia Inquirer, March 24, 1985, at 1, col. 6.

According to the Philadelphia Inquirer, EEOC's own records indicate that between 1970-1980, the percentage of both women and minorities in the private work force increased -- a 15% increase for Blacks, from 10.0% to 11.6% of the work force and a 19% increase for women, 34.4% of the work force to 41%.

The finding of the Potomac Institute Study authored principally by Herbert Hammerman is that the job increases came primarily in the managerial professional, skilled and technical categories even though there is evidence

that in other work categories mostly associated with minorities and women, the percentage of their participation remained stable or declined.

There is no question, again using the words of Chairman Thomas that "disadvantaged minorities and women have actually been helped as a result of affirmative action." The fact that discrimination still exist in the work place may be verified by the records within the possession of the EEOC itself. Smith, Review: Affirmative Action, 27 How. L.J. 495, 511 (1983); Report On Affirmative Action And the Federal Enforcement of Equal Employment Opportunity Laws, 97 Cong. 2d Sess. (published by the Subcommittee On Employment Opportunities Committee On Education and Labor, House of Representatives, 1982).

I ask Chairman Thomas, and each member of the Equal Employment Opportunity Commission: Do you want to be known as the Commission whose policies placed a chain of stone around the necks of minorities and women? The answer to this question must surely be no. This Summit calls for an attentive Commission; it calls for a Commission to take charge of its congressional mandate. It calls upon each member of the Commission to accept the fact that voluntary affirmative action (as set forth in EEOC's own guidelines) is consistent with our cherished notions of liberty, and the window of opportunity.

Finally, let me address the efforts on the part of some staff at EEOC and one or two members of the Commission to gut the definition of discrimination. During the year that I was Acting Chairman of EEOC, it was clear to me that some personnel in OMB, Justice, Labor and even in GAO had a mission

This Summit calls upon the Commissioners of EEOC to exercise their independent judgment: do not revise the Employment Selection Guidelines. This Summit calls upon the Commission not to succumb to political expediency to gut the Selection Guidelines.

This Summit asks the Commissioners of EEOC, to seriously consider the undesirable consequences of the current moves within the agency to gut the Griggs Doctrine.

As we leave this Summit, we intend to pay close attention to EEOC as well as the Department of Justice, and the Department of Labor.

This fight is not over. We've come to far to retreat. Keep your Eyes on EEOC.

more important than the reversal of affirmative action. The objective of the foes of Title VII was to eliminate all class based relief. See General Accounting Report, FPCD-82-26, July 30, 1982. (This report failed to include the Commission's formal reply to the GAO draft which is the usual courtesy afforded to agencies disagreeing with a GAO draft.) There are two targets which at this very moment are subject to serious scrutiny: EEOC's Uniform Selection In Employment Guidelines and the Griggs v. Duke Power Company, 401 U.S. 424 (1971) case decided in 1971. Griggs held that though an employment practice of an employer may be unintentional, it may still be discriminatory as it affects a particular group(s). This principle is embodied in the EEOC's Uniform Selection and Employment Guidelines. In fact, EEOC, may enforce Title VII against employers whose labor practices are neutral on their face but are discriminatory.

OMB, Justice and certain recent staff appointees at EEOC have been quietly working to undermine the Employment Selection Guidelines and erode -- by oratory -- the Griggs Doctrine. One policy has been to attempt to reduce the record-keeping requirements so that neither the government or a private litigant can prove discrimination.

If the Griggs Doctrine is reversed, the legal blueprint of Attorney General French Smith and the Administration's regressive civil rights policies in employment will have been achieved. The burden of proving discrimination on any basis covered by Title VII could require the proof of specific intent. Such a burden would substantially undermine Title VII enforcement by EEOC, and would impose an awesome burden of proof of discrimination on even identifiable victims.

The Corporate Counsel report

THE NATIONAL LAW JOURNAL

Interpretative and Explanatory

The EEOC's Standards for Employment Testing

By Clay Smith Jr.
Special to The National Law Journal

This is the first part of a two-part article. The concluding section will appear in the Sept. 30 issue.

MANY EMPLOYERS use tests or other selection procedures to hire, promote or assign employees. The use of these procedures may operate to exclude in disproportionate numbers minorities and women from the work force. The Equal Employment Opportunity Commission, as the lead agency in enforcing the federal laws concerning discrimination in employment, has been concerned about this problem for many years.

Title VII of the Civil Rights Act of 1964 does not forbid employers to use tests or other selection procedures, even when they adversely affect the employment opportunities of minorities and women. What it does do is to provide that, if the use of these tests results in an adverse impact, the employer must justify their use by showing that they are manifestly related to job performance. If the employer cannot make this showing, then use of the selection device in question is prohibited as discriminatory.

The government has attempted to provide guidance to employers and others about what constitutes "adverse impact," "relatedness" or "validity." This guidance is contained in a document called the "Uniform Guidelines on Employee Selection Procedures" (UGESP).

The uniform guidelines were adopted Aug. 25, 1978, by the EEOC, the Departments of Labor and Justice and the Office of Personnel Management, then known as the U.S. Civil Service Commission. They were subsequently adopted by the Office of Revenue Sharing in the Department of the Treasury. Therefore, UGESP represent a unified position by all government agencies with EEO enforcement responsibilities on the proper use of tests and other selection or promotion procedures.

The UGESP were later amplified and interpreted, but not modified, by the issuance of two sets of questions and answers, one on March 2, 1979, and the second on May 2, 1980. Although the guidelines have been the subject of considerable recent discussion and review, for the last seven years they have stated the consistent policy of all federal agencies charged with civil rights enforcement.

The UGESP do not have the force of law. The basic legal rights of individuals and groups discriminated against by the use of tests and other selection procedures are contained in Title VII as amended.

Nevertheless, the UGESP have several important functions. First, they set forth the state of the law and incorporate judicial interpretations of the process by which Title VII rights are enforced. While the UGESP, as applied by EEOC, are interpretative guides, they are important insofar as they explain prevailing legal opinion, and are given deference by the courts.

Additionally, the UGESP contain statements of the administrative policy with regard to the EEOC's processing of individual and class charges involving the use of tests and other selection procedures. While not imposing on the freedom of individuals to seek remedies in court, the UGESP place limits on what the commission will consider as evidence of a Title VII violation.

Finally, the UGESP incorporate and restate professional standards with regard to the sufficiency of evidence concerning the job-relatedness of tests and other selection procedures. These three functions, while interrelated, deserve separate discussion.

> Title VII does not forbid employers to use tests or other selection methods, even when they adversely affect job opportunities.

Legal Standards

The basic statement of the legal responsibilities of test users, as contained in Sec. 5A of the UGESP, is that:

> The use of any selection procedure which has an adverse impact on the hiring, promotion or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines.

This statement grew out of a trilogy of Supreme Court decisions: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Moody v. Albemarle Paper Co.*, 422 U.S. 405 (1975); and *Washington v. Davis*, 426 U.S. 229 (1976). In all three cases the court held that the EEOC guidelines were entitled to "great deference" in determining whether selection procedures comply with Title VII.

Although these decisions referred to earlier EEOC guidelines that were replaced by the UGESP, federal courts of appeals almost unanimously have given the UGESP the same deference, and, when district courts have not followed the UGESP, they have remanded cases with specific instructions to examine the employer's selection procedures in accordance with the uniform guidelines to determine whether the procedures have been validated properly. *U.S. v. City of Buffalo*, 633 F.2d 643 (2d Cir. 1980), *Johnson v. Uncle Ben's Inc.*, 628 F.2d 419 (5th Cir. 1980), vacated on other grounds, 451 U.S. 902 (1981). *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1281 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Decisions applying the UGESP to specific selection procedures have been handed down by district courts in all circuits and have been upheld on appeal in almost all the circuits. To date, only one appellate decision has given less than full endorsement to the use of the UGESP as a standard for determining Title VII violations.

In *Guardians Association v. Civil Service Commission*, 630 F.2d 159 (1980) (*Guardians IV*), the 2d Circuit cautioned against overly rigid application of the guidelines. The court noted that the guidelines combined the weight of expert psychological opinion with the legal import of agency administrative interpretation, but admonished that the guidelines carried less than the full force of law and that failure to comply with the guidelines did not establish a per se violation of Title VII.

While the court proceeded to criticize several aspects of the guidelines, it also affirmed the District Court's finding that the test placed before it was invalid. Three months after *Guardians*, another panel of the same court expressly adopted the UGESP as the standard for determining validity in *City of Buffalo* cited above.

When the use of selection or promotion procedures has been found to violate Title VII, courts generally have ordered as a remedy the development of new procedures and their validation in accordance with the UGESP. *Firefighters Institute v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), cert. denied 452 U.S. 938 (1981); *U.S. v. County of Fairfax*, 35 FEP Cases 982 (E.D. Va. 1981). The validity of the new selection procedures is then subject to court scrutiny and evaluation. *U.S. v. State*, 478 F. Supp. 1160 (N.D.N.Y. 1979).

In one case, *Kirkland v. New York State Department of Social Services*, 628 F.2d 796 (2d Cir. 1980), the court held that the new test designed under court order was properly validated under the guidelines only when test scores of black applicants were adjusted to take into account disparities in test performance that were not associated with similar disparities in job performance. Thus, the support given to the UGESP by the courts often goes beyond the specific determination of discrimination and into the remedy phase.

Administrative Policy

Many of the provisions of the UGESP are not based on law, but are matters of administrative discretion. These provisions include the bottom line, the 80 percent rule and the scope of the search for alternative selection procedures required to justify the use of a given test.

The bottom-line principle means that, in most instances, federal agencies will refrain from filing an enforcement action against a specific selection procedure if the total selection process does not have an adverse impact. This policy of administrative action was adopted at the request of the business community and in consideration of the

Continued on following page

Mr. Smith is a professor of law at Howard University School of Law. He is a former commissioner and acting chairman of the Equal Employment Opportunity Commission.

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Continued from preceding page

government's limited resources in filing enforcement actions.

In *Connecticut v. Teal*, 457 U.S. 440 (1982), the Supreme Court addressed an employer's argument that the bottom line of the company's selection procedures insulated it from individual claims of discrimination. In *Teal*, the employer, when selecting individuals for promotions, relied on, among other things, a test that had an adverse impact on blacks. The employer argued it was not liable to blacks barred from promotions as a result of the test, since the employer could show that at the end of the entire promotion process the "bottom line" was an appropriate racial balance of blacks and whites who would be promoted.

The Supreme Court rejected this argument and held that the bottom line did not preclude employees from establishing a prima facie case, nor did it provide employers with a defense where a specific practice — in this case a test — was discriminatory.

The "80 percent rule" for determining adverse impact is another matter of administrative discretion. The rule originally was adopted within the federal government by the Office of Federal Contract and Compliance (OFCCP) as a rule of thumb to indicate whether further inquiry into an employer's hiring and promotion practices would be justified.

No Further Inquiry

It provides that where an employer's rate of selection for a given protected group is 80 percent of the selection rate for the majority group, no further inquiry will be made. The rule was not intended to be a legal definition of discrimination, and, in most court cases, evidence of statistical significance is considered along with determinations of whether the 80 percent rule was violated. Nevertheless, courts have found adverse impact and discrimination when the 80 percent rule has been violated, even in the absence of evidence of statistical significance. *Cox v. Third v. Trail*, supra at 443 (1982); *U.S. v. City of Chicago*, 663 F.2d 1354, 1357 (7th Cir. 1981); *U.S. v. City of Montgomery*, 19 EPD Par. 9230 (N.D. Ala 1979); *Firefighters v. City of St. Louis*, supra; *Williams v. City of San Francisco*, 31 FEP Cases 885 (N.D. Cal. 1981).

While this view has not been uniform (see, e.g., *Rich v. Martin Marietta*, 467 F. Supp. 587 (D. Colo. 1979)), courts that have not followed at least as stringent a standard as the 80 percent rule are in the minority. The rule appears to coincide with the Supreme Court's interpretation of statistical significance in *Castaneda v. Partida*, 430 U.S. 482 (1977), and has been generally accepted. For example, in *Berkman v. City of New York*, 536 F. Supp. 177, 205 (E.D.N.Y. 1982), affirmed, 705 F.2d 584 (2nd Cir. 1983), the court, in finding the passing rate for women was zero, held the exam "had a disparate impact by any reasonable measure including the standards developed in *Castaneda* ... and by the Equal Employment Opportunity Commission in its Uniform Guidelines on Employee Selection Procedures."

The scope of an appropriate search for alternative selection devices has been a matter of considerable debate. The 1970 EEOC guidelines required that employers using selection procedures with adverse impact show, in addition to the validity of the selection procedures, that alternative procedures with a lesser adverse impact are not available.

'Cosmic' Search

This was interpreted by some as a requirement for a "cosmic" search resulting in a positive conclusion that nothing else exists anywhere in the universe. The guidelines attempted to eliminate this misperception by clearly stating that the search for alternatives is required only during the course of a validity study, and there need be only a reasonable investigation.

Federal agencies will refrain from filing an action against a specific selection procedure if the total process lacks an adverse impact. This policy was adopted at the request of the business community.

Further concerns about the definition of "reasonable" were dealt with in the second set of questions and answers, published on May 2, 1980. These Q and A's defined "reasonable," in most circumstances, as a search of the published literature. Investigation of the unpublished literature is required only when adverse impact is high and validity is low.

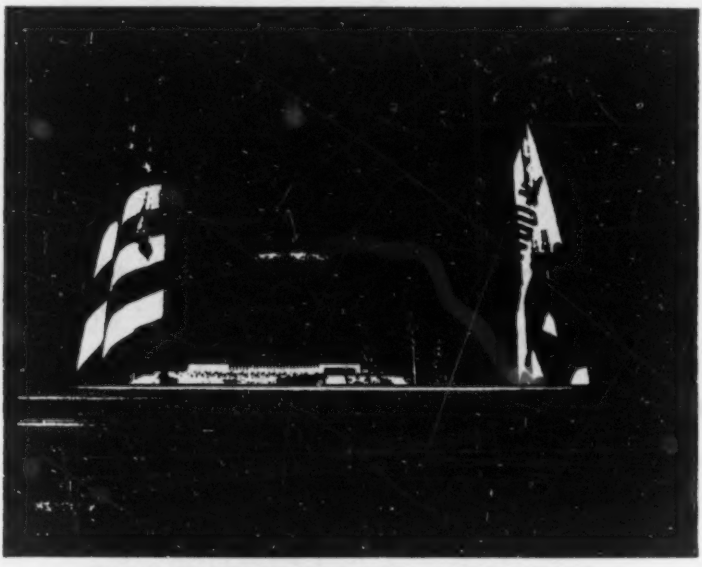
The limitations on the search for alternatives result from administrative decisions based on enforcement agencies' perceptions of what professional standards require when a validity study is conducted. The legal standard of *Moody*, under which a plaintiff can prove discrimination by showing that an alternative serving the employer's legitimate business needs but with lesser adverse impact exists, is not changed by the guidelines or the questions and answers.

The third function of the UGESP deals with the application of minimum professional requirements to validate selection procedures with adverse impact. This subject will be continued in the next Corporate Counsel Report.

Witness Testimony on Events Does Not Lead to a Waiver

A WITNESS does not waive the attorney-client privilege in regard to confidential communications previously made to an attorney when he testifies at trial, not about the specific content of those communications, but about events that were the subject of the communications, the Supreme Judicial Court of Massachusetts held July 26.

In *Commonwealth v. Goldman*, N-2810, John Glenn was indicted for assault with intent to murder, and made certain statements to a lawyer while discussing the possibility of being represented by him. Mr. Glenn later became a key prosecution witness in a related trial, and made statements to police that were just the opposite of those he had made to the attorney. Mr. Glenn refused to waive privilege. The court held that by testifying in the instant case regarding events that happened to have been a topic of a privileged communication, Mr. Glenn did not waive the attorney-client privilege concerning his conversation with the attorney. On this record, the court said, justice did not require that the privilege be overridden.



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The Corporate Counsel Report.
THE NATIONAL LAW JOURNAL

EEOC's Uniform Guidelines

Testing Must Relate to Specific Job Requirements

By J. Clay Smith Jr.
Special to The National Law Journal

This is the second part of a two-part article. The first part, appearing in the Sept. 16 issue, dealt with the legal standards and administrative policies incorporated into the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures.

SELECTION procedures having an adverse impact on minority hiring must have some minimal relationship to the professional requirements of the job to be filled. In addition to the legal standards and administrative policies they embody, the Uniform Guidelines on Employee Selection Procedures (UGESP) incorporate these professional standards. Some history on this point is in order.

The first set of EEOC guidelines, issued in 1966, did not contain professional standards but referenced instead the technical standards published by the American Psychological Association in 1954. The belief was that if a validity study met these generally accepted professional standards, its use would be justified under Title VII.

Validity has been defined in many ways by different professionals. It became clear that some limitations would be necessary to ensure that tests were not used to discriminate on the basis of race, sex or ethnic group membership. In *Griggs v. Duke Power*, 401 U.S. 424 (1971), general ability tests used to screen applicants for employment had been found to be legal by the district court and the appellate court because, according to expert testimony, they validly measured general intelligence and mechanical understanding, qualities that employers logically would want to find in their employees.

The U.S. Supreme Court reversed in part because the tests in question had not been shown to have a relationship to successful performance of the particular job in question. "What Congress has commanded," the court stated, "is that any test used must measure the person for the job and not the person in the abstract." *Id.* at 436.

The 1970 EEOC guidelines incorporated the requirement of validation against specific jobs mandated by the court. In addition, certain minimum standards governing the representativeness of the samples, the adequacy of the job performance measures and the acceptable range of validity were included in the guidelines. Other than these minimum standards, however, the technical requirements were the APA standards incorporated by reference into the guidelines.

Technical Standards

The technical standards of the EEOC guidelines have been given great deference by courts at all levels. For example, in *Moody v. Albermarle*, 422 U.S. 405 (1975), a validity study was found by the supreme court to be deficient when measured against the EEOC guidelines, reversing a lower court judgment for the defendant.

The application by the courts of professional standards other than those explicitly set forth in the EEOC guidelines has caused problems. The APA's published standards were somewhat vague, and subject to differing interpretations, and courts often were faced with the necessity of reconciling the conflicting testimony of two experts, each purporting to represent a professional consensus. Opinions such as those in *U.S. v. Chicago*, 411 F. Supp. 218 (N.D.Ill. 1976), affirmed in part, reversed in part, 549 F.2d 443 (7th Cir.), *cert. denied* 434 U.S. 875 (1977), and *U.S. v. State of New York*, 475 F. Supp. 1268 (N.D.N.Y.1979), expressed the need for a more clearly stated set of minimum technical standards that the enforcement agencies could use to evaluate validity studies, and that the courts could use as a guide in their evaluations. These minimum technical standards were included in UGESP.

It should be emphasized that the inclusion of these technical standards in the UGESP are not intended to dictate professional standards. They are intended to be consistent with professional standards, and the EEOC has turned to the psychological profession for guidance. After reviewing the UGESP and the published questions and answers, the APA Committee on Psychological Tests and Assessment stated on Feb. 11, 1980, that the "Guidelines have attained consistency with the standards [i.e., the 1974 revision of the APA's published standards] in those areas in which comparisons can be meaningfully made."

Soon the psychological profession will complete a revision of its published standards, which should incorporate recent developments in research and clinical practice. A joint committee, consisting of representatives of the American Psychological Association, the American Educational Research Association and the National Council on Measurement in Education, has been formed to weigh these developments, prepare a draft of new joint technical standards, hold open hearings on this draft and propose new standards.

Universal Validity

The U.S. Office of Personnel Management wrote this joint committee to suggest specific changes in the standards based upon their research, which purportedly shows that once a mental ability test is determined to be valid for one job, it is valid for all jobs and that differences in test scores between races, men and women and various ethnic groups will always anticipate differences in job performance between these groups rather than reflect at least occasional bias in the tests themselves. OPM has been lobbying for the acceptance of this theory. Hence, to preclude bias in testing as an explanation for differences in predictions of the job performance of minorities in effect creates a rule that perpetuates discrimination instead of eliminating it.

> To preclude bias in testing as an explanation for differences in predictions of the job performance of minorities can have the effect of creating a rule that perpetuates discrimination instead of eliminating it.

The joint committee has released five drafts, including one that was approved by the APA Council of Representatives in February, 1985 — three years behind schedule. Each draft unleashed a wave of public criticism and pressure on the committee from various sides to revise its professional standards. Although many changes were made in successive drafts, the committee continued to reject the concept of universal validity. This was due in part, no doubt, to the continuing criticism of OPM's methods and conclusions, both in the literature and in the courts.

One major result of the continuing public controversy (which included non-psychologists such as attorneys who typically represent employers in civil rights cases) has been a change in the committee's method of operation. Although the committee maintained since the beginning of the project that public hearings would be held, this plan was dropped at the last minute. It should be noted, in addition, that deference by business, the courts and the EEOC to the development of professional standards is limited, having to do only with psychometric issues and not with legal or policy issues. It remains the obligation of the EEOC and the courts to decide how professional standards relate to Title VII.

Nonetheless, the advocates of strong civil rights enforcement should be

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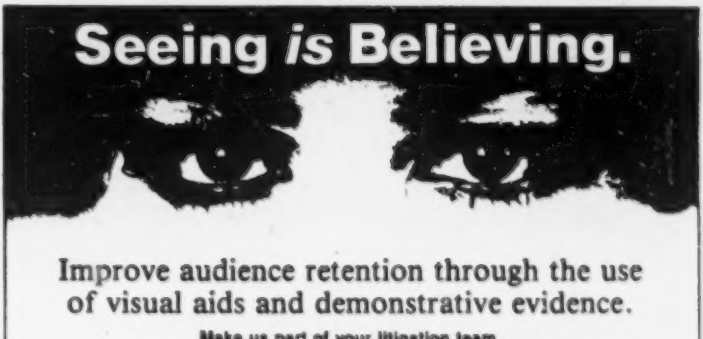
Mr. Smith is a professor at Howard University School of Law. He is a former commissioner and acting chairman of the Equal Employment Opportunity Commission.



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heartened by the joint committee's most recent action. On April 19, 1985, the Committee on Psychological Tests and Assessment, in a letter to EEOC chairman Clarence Thomas, announced it would be publishing the technical standards in June, 1985 and that the standards "are not in conflict" with "the present EEOC Guidelines." The letter concluded that there was "no compelling reason for revising the EEOC Guidelines on technical grounds." Furthermore, it concluded that there was no compelling reason for revision of the guidelines on legal grounds either.

(See, "APA Sees 'No Reason' to Revise Testing Rules, EEOC Chairman Tells OMB of Planned Changes," *Daily Labor Reports*, June 7, 1985, at A-8.)

Record-Keeping

Another area in which there has been a call for revision of the UGESP involves its requirement that employers keep specific records of their use of particular selection devices. The purpose behind the review is to reduce the burden on employers without undercutting the practical significance of the guidelines. EEOC designed survey questionnaires for this purpose, and obtained OMB approval for those forms in July, 1981. Distribution of the forms was delayed, however, because the General Accounting Office subsequently expressed concern over the survey design.

In an effort to accommodate those concerns, the commission held numerous meetings with the staffs at OMB, GAO and the Bureau of the Census. Additionally, the survey design was coordinated with the other federal agencies that are signatories to the guidelines, including OPM and the Department of Justice. The process was a difficult one, as it involved reconciliation of the competing advice and positions of various governmental agencies. It was particularly complicated by the fact that several of those agencies apparently viewed the UGESP review as a vehicle for challenging EEOC's assigned role as the lead agency in enforcing the laws governing employment discrimination. In fact, at one point OMB withheld approval for the survey on the ground that it was not necessary.

In testimony before the House Subcommittee on Civil Service, GAO officials expressed the view that the EEOC's role in conducting the record-keeping survey raised concerns about the "appearance of conflict of interest" in that "the agency most strongly committed to the continuance of the Guidelines is charged with conducting a review of its administration and regulatory burden." This comment followed an earlier letter from OPM to OMB asserting that "EEOC leadership has a strong vested interest in preserving the Guidelines in their present form" and that "only OPM has the professionally competent staff to review the technical issues in the Guidelines."

Authorized Agency

The commission believed these charges to be wholly unfounded. The commission was given the responsibility to function as the lead agency in equal employment opportunity by the Civil Rights Reorganization Act of 1978 and Executive Order 12067 because it is the primary enforcer in the field. Indeed, OPM is a signatory to the UGESP only because its predecessor, the Civil Service Commission, had authority to enforce Title VII in the federal sector. That authority was transferred to the EEOC in 1979. Thus, OPM's present status is merely that of an employer covered by Title VII — an employer who developed tests that were judicially determined to be discriminatory in *U.S. v. State of New York*, *supra*, and *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

In the end, OMB decided that EEOC should undertake the record-keeping review. The commission decided not to send out any survey. Instead, the commission announced in the Federal Register in July, 1983, that it was seeking comments on UGESP's record-keeping provisions. Although it invited general comments, the commission in its notice stated it sought specific guidance on the following issues. First, the commission requested comment on whether the UGESP should define what records a user must maintain. Additionally, the commission requested information on whether the records retention period should be modified; whether the UGESP should define the term "applicant"; and what government enforcement agencies should do when they learn that a user has failed to comply with record-keeping provisions.

The commission also sought comments on whether the UGESP should be applied in the processing of complaints under the Age Discrimination in Employment Act and whether UGESP's record-keeping provisions had to be modified in light of *Connecticut v. Teal*, 457 U.S. 440 (1981), which focused on the overall effect of a testing program. The commission has been studying the comments it received for well over a year, and its proposed modifications, if any, should be announced shortly.

Modification in one area seems inevitable. The current UGESP do not require employers to retain records on individual components of a multi-step selection procedure, even though these components may have an adverse impact. In light of *Teal*, the commission, in order to discharge its statutory duty, must now require users to maintain those records on selection devices that have an adverse impact and that preclude an applicant from further consideration.

Guidelines Intact?

The present chairman, Clarence Thomas, of the EEOC has stated to the press that he has "a lot of concern" about UGESP. He has stated that he has "the feeling the guidelines could have an adverse effect" on business and "that employers who are concerned that their tests won't be validated are giving up tests entirely and making more subjective judgments." The chairman has further stated that he will take a hard look at the substantive aspects of UGESP and that there is a good possibility that the guidelines will be subject to "significant changes." *Daily Labor Reporter*, Feb. 7, 1984, at A-9, and Nov. 19, 1984, at A-9.

The UGESP have enjoyed judicial acceptance because they are rooted in supreme court holdings. The teachings of those cases are simple. Title VII prohibits not only intentional discrimination but selection procedures that are neutral on their face but have a discriminatory effect, where the administrator of the test cannot demonstrate, using a generally accepted professional validation method, that its principle of selection is job-related.

Despite the fact that the guidelines have been a positive force in combating employment discrimination, there is certainly nothing irregular in their periodic re-examination by the EEOC. However, the public does expect such reviews to be fair and objective, without false assumptions, free of political coercion and consistent with prevailing law.

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PREPARED STATEMENT OF COLEMAN A. YOUNG, MAYOR, CITY OF DETROIT

Chairman Martinez, and Members of the Subcommittee:

I am Coleman A. Young, Mayor of the City of Detroit. I welcome the opportunity to submit written testimony to the Committee concerning the Office of Federal Contract Compliance Programs of the U.S. Department of Labor. It is important that the Committee has included the Office of Federal Contract Compliance Programs as a topic in its series of oversight hearings on the effectiveness of the nation's affirmative action programs. At the same time, it is unfortunate that recent actions by the Administration have called into question the appropriate means for addressing discrimination and achieving equal employment opportunities for all Americans.

The nation's cities have worked hard to develop plans and programs to address the complex problems of employment discrimination. I can proudly look back upon a history of affirmative action measures that have worked in the City of Detroit to bring blacks, women and other minorities into the mainstream of economic and political life. These measures have been a benefit to the City as a whole.

During the past several months, however, we have witnessed an attempt by the Administration to change the direction of the nation's civil rights laws. For example,

the Department of Justice recently challenged the validity of consent decrees in some fifty one jurisdictions, in light of its interpretation of the Supreme Court's decision in the case of Firefighters v. Stotts. This occurred even though its interpretation of Stotts was in conflict with numerous courts of appeals, members of Congress, and the civil rights community.

The most recent step in what appears to be a series of concerted actions by the Administration to dismantle the nation's civil rights laws, has been a proposal prepared by White House staff to amend Executive Order 11246. As you know, the proposed amendment would rescind rules that require some government contractors and subcontractors to set numerical goals for hiring minorities and women. Congress should encourage Labor Secretary William E. Brock to oppose provisions to amend the Executive Order or any other action that would modify or change Executive Order 11246 from its current form at this time.

Amendments to Executive Order 12246 currently being proposed to the President would clearly eliminate the enforcement authority of the Office of the Federal Contract Compliance Programs. The proposed elimination of minority hiring goals and timetables for federal contractors by Executive Order calls into question the federal governments commitment to enforcing the nation's civil rights laws.

The proposed amendment to Executive Order 11246 would merely require that government contractors and sub-contractors engage in affirmative recruitment of minorities and women. This is a clear departure from existing legal framework. History has proven that recruitment without more, is insufficient to eliminate the vestiges of discrimination in the workplace.

As you are aware, affirmative action in hiring of minority workers was first required of Federal contractors by President Kennedy in Executive Order 10925 on March 6, 1961. The affirmative action requirements of that Executive Order were based on the view that government support was necessary to secure equal employment opportunities for racial and ethnic minorities.

President Johnson's Executive Order 11246 preserved and enhanced the contract compliance program implemented by President Kennedy. Foremost, the Johnson Order institutionalized the federal contractor equal employment opportunity program by assigning responsibility for it to the Secretary of Labor. This resulted in the formation of the Office of Federal Contract Compliance Programs.

Regulations of the Office of Federal Contract Compliance Programs provides the basis of affirmative employment practices in practically every American industry. The proposed amendment to Executive Order 11246, however,

would revoke all regulations and guidelines promulgated pursuant to the Executive Order that were inconsistent with the amended Order. In sum, the proposed amendments to Executive Order 11246 would virtually eliminate the authority of the Office of Federal Contract Compliance Programs to conduct meaningful enforcement as it was originally empowered.

Proponents of the amended Executive Order suggest that the use of any numerically based remedies that take race, sex, or national origin into account are but a form of reverse discrimination. This is simply not true! Moreover, this analysis is clearly contrary to the plethora of legal authority in this area.

Historically, numerically based measures have been used to undo the consequences of past or current discrimination. The legality of numerically based measures to overcome the effects of discrimination has long been validated by the Supreme Court in cases that include United Steelworkers v. Weber, Fullilove v. Klutznick, and Regents of the University of California v. Bakke. In essence, the proposed amendments to Executive Order 11246 would eliminate the legal bases which are the foundation of these cases.

I stand not alone in joining the effort to preserve this nation's civil rights laws to ensure equal employment opportunities are provided. The U.S. Conference of Mayors,

of which the City of Detroit is a member, adopted a policy in 1984 that calls for strengthening equal employment opportunity through federal contracting. A copy of that Resolution is attached to this statement.

As members of these influential committees and subcommittees, you are in a position to preserve the nation's civil rights laws. I encourage you to continue to monitor the activities of the Administration and halt the present attempt to destroy the positive gains brought about by Executive Order 11246. As guardians of the public interest, local government officials must join with Congress to insist that the Administration abides by the law and devotes its enforcement efforts towards eradication of the vestiges of discrimination in the workplace.

City of Detroit Executive Office *Coleman A. Young, Mayor*

September 9, 1985

The Honorable Ronald W. Reagan
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

I have had the opportunity to review the proposed amendment to Executive Order 11246 prepared by White House staff. As you know, the proposed amendment would rescind rules that require some government contractors and subcontractors to set numerical goals for hiring minorities and women. I urge that you not sign the proposed amendment to Executive Order 11246, or seek modifications to the Order as a compromise position.

The proposed amendment would clearly eliminate enforcement authority of the Office of Federal Contract Compliance Programs. Moreover, the amendment is in sharp conflict with Supreme Court decisions, fair employment laws and remedies for past discrimination.

Affirmative action in hiring of minority workers was first required of Federal contractors by President Kennedy in Executive Order 10925 on March 6, 1961. The affirmative action requirements of that Executive Order were based on the view that government support was necessary to secure equal employment opportunities for racial and ethnic minorities. Furthermore, the Kennedy Order provided specific penalties for noncompliance with contractual obligations.

President Johnson's Executive Order 11246 preserved and enhanced the contract compliance program implemented by President Kennedy. Foremost, the Johnson Order, institutionalized the federal contractor equal employment opportunity program by assigning responsibility for it to the Secretary of Labor. This resulted in the formation of the Office of Federal Contract Compliance Programs.

Historically, the use of numerically based remedies that take race, sex

or national origin into account seek to undo the consequences of past or current discrimination. The legality of numerically based measures to overcome the effects of discrimination was validated by the Supreme Court in United Steelworkers v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980); and Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The Supreme Court in Weber held that Title VII permits affirmative action efforts by private parties to eliminate traditional patterns of racial discrimination. Fullilove extended affirmative action protection to minority set-aside programs. Finally, Bakke found neither Title VI nor the Fourteenth Amendment's Equal Protection Clause prohibited the use of racial preferences.

The City of Detroit has worked hard to develop affirmative action plans and programs to address the complex problems of employment discrimination. I am proud to tell you that these programs have proven to be successful in eliminating the vestiges of discrimination in the workplace.

As a nation, great progress has been made in Civil Rights over the past twenty years. Please do not turn back the clock. Again I urge that you halt all further action on the proposed amendment to Executive Order 11246.

Sincerely,

Coleman A. Young

COLEMAN A. YOUNG
Mayor

cc: William E. Brock,
Secretary of Labor

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